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No. 03-031272

IN THE

Supreme Court of the United States

CAREY DUNAI LOHRENZ,

Petitioner,

v.

ELAINE DONNELLY, Center for Military Readiness, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under what circumstances does the First Amendment require that we treat an ostensibly "private" person as a "public figure" for the purposes of the law of defamation, when the public attention that the person has acquired is not the result of any voluntary entry by that person into an arena of public debate, but is instead the product of happenstance, in which the person has been drawn into the arena of public attention involuntarily, through the press of events and controversies outside the person's control?

2. Should a quiet, non-publicity-seeking female naval aviator who was among the first of two women trained to fly F-14 Navy combat jets be deemed a public figure, even though she did not voluntarily seek media attention, merely because she voluntarily to "suited up" for a combat-ready assignment at a time in American history in which the role of women in combat was controversial?

3. Should this Court repudiate, or substantially narrow, the one-sentence statement made by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), in which this Court stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."?

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OPINION BELOW

On December 12, 2003, the United States Court of Appeals for the District of Columbia Circuit rendered its published opinion in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003) (App. A). The memorandum opinion of the District Court is dated August 16, 2002 (App. B).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . ."

STATEMENT OF THE CASE

This Petition presents a core question that has for decades vexed American constitutional law and culture: Under what circumstances does the First Amendment require that we treat an ostensibly "private" person as a "public figure" for the purposes of the law of defamation, when the public attention that the person has acquired is not the result of any voluntary entry by that person into an arena of public debate, but is instead the product of happenstance, in which the person has been drawn into the arena of public attention involuntarily, through the press of events and controversies outside the person's control?

The Petitioner here, Carey Dunai Lohrenz, was a female naval aviator who did not seek publicity or attention. She was merely a Navy pilot who volunteered to serve her country. Just as she was finishing her basic regimen of pilot training, the Department of Defense changed its rules regarding the assignment of women to combat positions, and Carey Lohrenz became one of the first two women eligible to train for and fly F-14 Tomcat fighters from Navy aircraft carriers.

At the time Lohrenz became an F-14 fighter pilot, the role of women in combat was controversial. There was nothing at all controversial, however, about Lohrenz' career. She had been

a quiet and relatively reclusive naval aviator dedicated to doing her job. Tragically, events changed this. The other woman who had also been among the first two women trained to fly the F-14, Lt. Kara Hultgreen, crashed and died while landing on the *U.S.S. Abraham Lincoln*. This tragedy was seized upon by those opposed to women in combat, as "evidence" supporting their argument that women were unfit for combat aviation duty. Launching what Lohrenz has alleged was a defamatory smear campaign against her, the Respondents Elaine Donnelly and the Center for Military Readiness ("CMR") propagated the claims that Lohrenz was an unfit pilot, who had been promoted by the Navy to fly F-14's through a politically correct affirmative action program in which the Navy advanced women such as Lohrenz into combat assignments for which they were not qualified.

Lohrenz maintains that Donnelly's defamation campaign, circulated widely within the naval aviation community, including her fellow pilots on the *U.S.S. Abraham Lincoln*, precipitated a downward spiral in which her reputation was severely damaged, that she suffered considerable stress, that her performance as an aviator suffered, and that in the end this led to the ruin of her career in the Navy and as a pilot.

From the outset of this litigation it has been clear that the Lohrenz' case might be won or lost on the resolution of the question of whether she should be deemed a public figure or a private figure. If she is a public figure, the question of whether she has presented a sufficient evidentiary basis to create a triable issue of fact as to whether the defendants published their defamatory accusations with "actual malice," knowledge of falsity or reckless disregard for truth or falsity, is a close question on which reasonable minds might differ. While Lohrenz vigorously contested the actual malice issue in both the District Court and the Court of Appeals below, Lohrenz does not bring that issue, which is heavily fact-intensive, to this Court. Rather, Lohrenz presents to this Court the clean and pristine question of whether a plaintiff who has not sought publicity and not sought to influence the outcome of public debate may

nonetheless be forced to accept the disabilities of public figure status through sheer dint of her voluntary military service to her country.

The District Court held that Lohrenz was a public figure, though it conceded that this ruling was largely grounded in the possibility that Lohrenz could become a public figure involuntarily. *Lohrenz v. Donnelly*, 223 F. Supp.2d 25 (D. D.C. 2002), App. 29b. The District Court thus held that Lohrenz was a public figure, "albeit possibly involuntarily," App 61b, a holding openly influenced by the controversial decision of the United States Court of Appeals for the District of Columbia Circuit in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985). *Dameron* has long been understood as the high-water mark among American cases holding that the First Amendment may require that some persons be deemed public figures in defamation suits even in the absence of any voluntary action inviting public figure status, on the theory that individuals may occasionally be swept into the realm of public figure status through "sheer bad luck." *Dameron*, 779 F.2d at 742.

In her appeal to the Court of Appeals, Lohrenz attacked the District Court's ruling on constitutional law and policy grounds, arguing that the District Court's ruling, based as it largely was on the *Dameron* construct that recognized that individuals could become "involuntary" public figures, should be reversed and rejected by the Court of Appeals. Lohrenz openly invited the Court of Appeals to repudiate and renounce the involuntary public figure doctrine enshrined by *Dameron*. The Court of Appeals below declined this invitation. The Court of Appeals. held that it need not reach the frontal attack on the involuntary public figure doctrine launched by Lohrenz, because whether or not one accepted the legitimacy of the involuntary public figure concept, Lohrenz was appropriately classified as a *voluntary* public figure, *solely* because she clearly *did* volunteer for assignment as a naval aviator *at a time in American history in which the role of women in combat was controversial.*

Seeming to invite either *en banc* review or review by this Court through a petition for certiorari, the panel opinion below thus took pains to clear away all the distracting underbrush, eliminating from contention all factual and legal arguments that Lohrenz had voluntarily entered a pre-existing legal controversy to attempt to influence the outcome of that controversy. To the contrary, the Court of Appeals actually accepted *all* the factual submissions advanced by Lohrenz, refusing to credit any of the claims of the defendants below that Lohrenz had voluntarily invited media attention by entering a public debate. Rather, the Court of Appeals rested its ruling *entirely* on the reasoning that in choosing voluntarily to "suit up" for a combat-ready assignment at a time in American history in which the role of women was controversial, Lohrenz had volunteered for public figure status. The Court of Appeals, through a bit of euphemistic sleight-of-hand, thus claimed to have avoided the pristine question of whether "involuntary public figures" could ever exist, on the reasoning that Lohrenz *had* "volunteered "for a duty position *as a woman* in which the role of women was controversial.

On the surface this might be seen as having avoided the question, which has festered unresolved by this Court for three decades, of whether a plaintiff can become an public figure "involuntarily." This avoidance, however, was entirely on the surface. For while the Court of Appeals may have pretended to avoid a frontal confrontation with the "involuntary public figure" construct, this avoidance was a mere play on words. In holding that Lohrenz was a voluntary public figure, the Court of Appeals openly laid down the policy gauntlet, making it clear that Lohrenz was a voluntary public figure *only* in the sense that she voluntarily "suited up" as a female naval aviator.

The question of constitutional law and policy is thus cleanly presented. Should we saddle a defamed plaintiff with public figure status *solely* because the plaintiff voluntarily assumed the role of a "pioneer" in breaking a gender barrier, in circumstances in which the plaintiff has not otherwise sought

to influence this public debate, and has done all she reasonably can to maintain a low profile and *not* invite public attention?

The submission of Lohrenz here is that this issue presents an enormously important question of constitutional law upon which lower courts have divided. This Court should grant this Petition to bring clarity and guidance to this important area of First Amendment / defamation litigation. More fundamentally, this Court should grant this Petition to restore a proper balance between freedom of speech and freedom from falsehood.

The decisions of this Court have sought to strike the appropriate balance between our nation's robust commitment to freedom of speech and the vital interests served by defamation law, which the Court has described as reflecting "no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The dividing line between public and private figures is an essential bulwark in the preservation of this "essential dignity."

At the heart of this critical doctrinal dichotomy there rests a corresponding set of mediating moral and policy judgments, often described in the shorthand of "assumption of risk" and "access to the channels of communication." The first judgment is grounded in notions of fairness and assumption of risk: It is a fair "bargain" to impose on public figures additional exposure to risk of injury to reputation as part of the price of voluntary entry into the public arena. A second judgment is grounded in our profound national commitment to free public discourse and robust debate: When persons enter an arena to participate in public discourse and influence the outcome of a public controversy, it is important that we provide "breathing space" to all points of view in that debate, and in the service of that breathing space we rely heavily on the marketplace of ideas, and on the access of those individuals to channels of mass

communication, to provide correctives and reputational self-defense. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344.

Given these animating policies, it is no surprise that in defining who is and is not a public figure, First Amendment defamation doctrine has long placed heavy emphasis on whether the individual has *voluntarily* entered a public controversy to influence its resolution. And indeed, this Court's defamation jurisprudence has been entirely faithful to these policies and their corresponding doctrinal divisions.

The District of Columbia Court of Appeals, however, has taken a wrong turn, endorsing the notion that a plaintiff could become a public figure for defamation purposes *involuntarily*, through nothing more that "sheer bad luck." Carey Lohrenz submits that this is a mistake. The "sheer bad luck" doctrine is "sheer bad law," law that has lost the moral and policy compass that ought to guide this field.

The errant strain of involuntary public figure doctrine that has taken hold in the law of the District of Columbia Court of Appeals is entirely grounded in that Court's expansive misinterpretation of one passing statement made by this Court in *Gertz*, in which this Court stated: "*Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.*" *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344. This sentence, and the gloss that some lower court decisions have laid upon it, have fueled the "involuntary public figure" concept, and have undercut the real balance contemplated by *Gertz* and its progeny, such as *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). It has been over twenty-five years since this Court has addressed the scope of the public figure doctrine in defamation law. The result below, in which a Navy pilot who was simply trying to serve her country was deemed a public figure by dint of nothing more than her gender

alone, demonstrates that it is time for this Court to address this area again, and apply an restorative corrective.

The critical constitutional question posed by the outcome below ought not be papered over through the cosmetic linguistic that Lohrenz did, after all, "volunteer." For while the Court below did reason that Lohrenz had "volunteered" for public figure status, it is absolutely clear that her voluntariness was not the usual kind of voluntariness found in public figure cases. The Court of Appeals conceded that Lohrenz had *not* voluntarily entered a public debate to influence its outcome, had *not* volunteered for media attention, and had *not* volunteered in for *anything* other than suiting up to fly combat jets at a time when the role of women in the military was controversial. App. 18a. This was to stretch the concept of "volunteering" to the point at which it became essentially *involuntary volunteering*. If what Lohrenz did counts as volunteering for public figure status, then the requirement of voluntary entry into the public arena becomes little more than a euphemism. The decision below breaks faith with the ideal of protection of reputation as a core principle embracing "our basic concept of the essential dignity and worth of every human being — a concept at the root of any system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES THAT UNDERGIRD THIS COURT'S FIRST AMENDMENT DOCTRINES DEFINING THE CONTOURS OF THE PUBLIC FIGURE DOCTRINE

A. The Court of Appeals Judgment is Ultimately Grounded in the Sole Fact that Lohrenz "Suited Up" For Naval Aviation Combat as a Woman

The decision of the Court of Appeals rested starkly on the elemental proposition that Lohrenz, as a pioneer in breaking a gender barrier for women in combat, was by virtue of her voluntary entry into that duty a public figure, even though she

had not sought media attention, had not attempted to use her position to influence debate, had been generally reclusive, and had engaged only in a modicum of local interest puff-piece interviews with home-town newspapers and one San Diego-based naval aviator magazine. The pivotal passage in the opinion thus stated:

> Because Lohrenz's evidence shows that she chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she "suited up" as an F- 14 combat pilot.

App. 2a.

The Court of Appeals' dismissive judgment that Lohrenz' claim that she was just a good naval aviator doing her job "rings hollow" buries the very point in dispute. The Court of Appeals' explanation for this putatively hollow ring was entirely its insistence that Lohrenz must have known that as a woman suiting up for combat jets she would attract attention. Indeed, a close reading of the passage above reveals that Court of Appeals did *not* claim that Lohrenz voluntarily assumed the risk of *media attention* by entering a *public debate* in any conventional sense, but merely that she voluntarily assumed the risk *of assignment to combat duty* by choosing *training for combat jets*. Lohrenz has consistently maintained that she could don the pilot's uniform to serve her nation as a female pilot and not automatically don the mantle of public figure status. This

argument "rings hollow" only if one assumes the premise in question.[1]

The Court of Appeals focused heavily on the broad general societal debate over the role of women in combat. The Navy's decision to assign Lt. Lohrenz and Lt. Hultgreen as the first women to pilot United States armed forces' combat aircraft, the Court noted, "occurred amidst an ongoing public controversy about the appropriateness of women serving in combat roles in the military." App. 5a. The Court in turn reasoned that a "subcontroversy" existed over the issue of whether the military should relax physical strength and other standards to account for differences between male and female members of the armed services. App. 5a. And yet another subcontroversy existed, the Court reasoned, as to whether women should serve as combat pilots. App. 5a. These controversies persisted even after 1991, when Congress repealed the law barring women from combat fighters and bombers, and after April 1993, when, on the heels of the Tailhook scandal involving allegations that Navy officers had sexually harassed enlisted women, the Secretary of Defense lifted the Defense Department's ban on women serving in such positions. App. 5a.

The Court of Appeals conceded that Lohrenz "never initiated any contacts with the media prior to the alleged defamations." App. 5a. The Court noted that her hometown newspapers (in Green Bay and Milwaukee, Wisconsin) published brief human interest stories about her and her family members, most of whom have been military pilots, and that she participated in similar human interest stories while in training in San Diego. The Court of Appeals did not find significance in this relatively low-grade media attention, however, noting instead that Lohrenz' Commanding Officer "succeeded in deflecting most of the media attention directed at her, which

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1. It is important to emphasize that at the time Lohrenz volunteered for pilot status, women were not assignable to combat duty. Thus it is not at all fair to say that she volunteered for public figure status when she "suited up" for combat pilot status.

was Lohrenz' wish." App. 6a. The media dynamic changed, however, after the fatal crash of Lt. Hultgreen on October 28, 1994. Lt. Hultgreen died while attempting to land an F-14 on the *U.S.S. Abraham Lincoln*. (The Navy subsequently determined that the plane did not signal to the pilot that one of its engines was not working until it was too late to avoid a crash.) App. 6a. After Lt. Hultgreen's death, the Court of Appeals noted, "the media turned its attention to the question of whether the Navy had established a 'double standard' in order to enable women to qualify as combat pilots, initially focusing on Lt. Hultgreen." App. 6a. Indeed it was not until *three months after Lt. Hultgreen's crash* that Elaine Donnelly, who had long opposed permitting women to serve in combat positions, brought intensive and damaging attention to Lohrenz. Through a series of publications and speeches over the course of a year, Donnelly and her organization CMR systematically maligned Lohrenz, using her as the principal exhibit in a broader campaign against women in combat.

The Court of Appeals also pressed the point that an individual's subjective intent to be or not to be a public figure does not control the determination of public figure status. App. 16a. Like most simple truisms, however, this point is true, but of value only so far as it goes. It is certainly accurate to say that the question of whether or not a plaintiff is a public figure must be an objective determination, not a subjective one. But this only begs the question of *what types of conduct* will objectively render one a public figure. Is it enough that one accepts a job that might invite attention? Or is more required?

On the day that Lt. Kara Hultgreen was killed in her plane there were hundreds of thousands of men and women serving in the armed forces. Were they all public figures? Or only the jet pilots? Or only the female jet pilots — the ostensible theory of the Court below? The proper question is not whether Lohrenz subjectively desired public figure status — clearly she did not. The proper question is whether Lohrenz objectively volunteered to enter a pre-existing public controversy in an attempt to

influence its outcome. The only answer to this question that is consistent with the rationale of *Gertz* and the competing constitutional tensions between freedom of speech and protection of individual dignity is that Lohrenz did not voluntarily enter a public controversy. And unless this Court is willing to say that Lohrenz must be treated as a public figure nonetheless, the ruling of the Court of Appeals ought not stand.

B. Public Figure Status Should Be Grounded in Voluntary Entry Into Public Debate

The entire notion of an "involuntary" public figure is in substantial tension with the theoretical assumptions that under gird First Amendment principles emanating from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The *New York Times* case, a cornerstone of modern First Amendment jurisprudence, was grounded in an antipathy toward seditious libel. In establishing the actual malice standard for libel suits brought by public officials, this Court heavily emphasized the importance of providing "breathing space" for speech critical of public officials, and their conduct in and fitness for office. The *New York Times* case was thus an opinion driven by the importance of protecting the marketplace of ideas, public discourse, and debate, decided "against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . ." *Id.* at 270.

When this Court originally extended the reach of the *New York Times* rule beyond public officials to public figures, the Court remained faithful to this public discourse rationale. When, in the companion cases *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) and *Associated Press v. Walker*, 388 U.S. 130 (1967), the Court expanded the *Times* standard, the extension was based on the supposition that many persons who do not hold government office nonetheless play an influential role in the resolution of social issues. *See id.* at 163-64 (Warren, C.J., concurring).

For a brief period, a plurality of this Court seemed to abandon this doctrinal tie to society's deliberative processes, divorcing the actual malice standard from the identity of the plaintiff and the plaintiff's role in influencing the outcome of public debates, and instead linking the actual malice standard to a far more expansive "issue of public concern" construct. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a four-Justice plurality thus held that the actual malice standard should apply if the subject matter of the speech "is a matter of public or general concern without regard to whether the persons involved are famous or anonymous." *Id.* at 44.

The *Rosenbloom* approach was repudiated, however, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court held that in defamation actions brought by private figures in which the defamatory speech involves issues of public concern, states are free to predicate liability on a showing of ordinary negligence. The public figure / private figure dichotomy was grounded in two rationales. The first of these rationales, the "access to the media" argument, was based on the assumption that public officials and public figures are more likely to have effective opportunities for self-help when they are defamed, because they generally enjoy significantly greater access to channels of effective communication. *Id.* at 344. The second rationale in *Gertz* was more normative, largely reflecting the homespun moral that one who seeks the public arena must accept the heat of the fire as part of the price of entering the kitchen. People who voluntarily attain public figure status often have assumed roles of special prominence in social affairs, and in all fairness they may be required to accept greater public scrutiny and greater exposure to defamation as part of the cost of such fame. *Id.* at 345.

Gertz was thus to a large degree a return to the public discourse rationale of *New York Times*, *Walker*, and *Butts*. Both the "assumption of risk" and "access to the media" rationales were substantially tied to notions of influencing debate and public discourse. Indeed, most of the *Gertz* Court's

discussion of public figures emphasized such factors as "power" and influence" in matters of public debate. *Id.* at 344-45.

The notion that an "involuntary" public figure might exist traces its genesis to one sentence in *Gertz*. That sentence, italicized below, was part of the Court's broader description of the various classifications of public figures. This passage in its entirety reads:

> *Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.* For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345 (emphasis added). There are several points worth making about this passage. First, it was far from an unequivocal declaration that "involuntary" public figures definitely exist. The mention of involuntary public figures was made on the fly, without analytical development or justification. The solitary sentence in which this possibility was raised began with the word "hypothetically," and merely said that it "may be possible" for such a figure to exist, ending with the caution that "the instances of truly involuntary public figures must be exceedingly rare." *Id.*

Most importantly, however, the Court's casual and hypothetical mention of involuntary public figures was pointedly *not* consistent within any of the larger themes animating the *Gertz* opinion. *All* of the other discussion of public figures in the case spoke in terms of the debate and discourse-related theories that originally drove *New York Times*, *Walker*, and *Butts*.

The Court in *Gertz* thus spoke of the "pervasive power and influence" of "all purpose" public figures, and in discussing limited-purpose public figures, spoke of persons who had "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* All these public figures, the Court said, "invite attention and comment." *Id.* These are not terms consistent with the notion of involuntary public figures. Words and phrases such as "thrust," "forefront of particular public controversies," and "in order to influence the resolution of the issues" are incoherent when applied to the involuntary figure.

The three cases from this Court that followed *Gertz* reinforced this theme, and indeed were even more stringent than *Gertz* in their emphasis on factors such as the plaintiff's voluntariness, attempts to influence public discourse, and assumption of risk. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), for example, the Court ruled that Mary Alice Firestone, wife of Russell Firestone, a member of the wealthy Firestone family, was a private figure, despite being embroiled in bitter and highly-publicized divorce litigation. She had done nothing to invite public controversy other than to participate in the litigation, the Court reasoned, and this was not enough to bring her within the definition of a public figure. Firestone's prominence in what the Court depicted as "the sporting set" did not qualify her as a person of "especial prominence in the affairs of society." *Id.* at 453. Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation, Firestone was drawn into a public forum largely against her will as a consequence of her invocation of the only redress available to her. *Id.* at 457. So too, the Court stated that Firestone's appearance in a few press conferences to satisfy the press inquiries did not convert her into a public figure. *Id.* at 455, n.3.

Continuing these themes, the Court in *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), held that the

plaintiff Wolston, who had been brought before a grand jury investigation in connection with an espionage inquiry, was a private figure. Wolston was subpoenaed by the grand jury after his aunt and uncle pleaded guilty to charges of espionage. *Id.* at 161-62. After appearing before the grand jury on several occasions, Wolston ignored a subpoena requiring him to appear before the grand jury in 1958, and subsequently pleaded guilty to a charge of criminal contempt. *Id.* at 162-63. Wolston's episode with the grand jury investigation and his subsequent conviction for criminal contempt *resulted in 15 newspaper articles* in New York and Washington, D.C., and other publications on Soviet espionage. *Id.* at 163. Yet despite all of this, the Court held Wolston was a private figure, emphasizing that Wolston had not invited attention. Even though it could have quite plausibly been understood that Wolston had in at least a constructive sense "voluntarily" entered the controversy by not appearing before the grand jury, the Court did not find this enough to qualify him for public figure status.

Finally, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court held that an academic who had received substantial federal grants for research was a private figure for purposes of criticism of those grants by United States Senator William Proxmire, who had bestowed upon the academic one of his infamous "Golden Fleece" awards, a mock prize that Senator Proxmire invented to expose what he regarded as waste in government. Hutchinson had voluntarily applied for federal funds, and reports of his successes in obtaining federal grants appeared in local newspapers and scientific journals. Furthermore, Hutchinson was not without access to the media; some newspapers and wire services reported Hutchinson's response to the Golden Fleece Award. *Id.* at 134. Once again, however, the Court found that the plaintiff was not a public figure, echoing *Firestone* and *Wolston*. Of particular importance for the purposes here, the Court in *Hutchinson* stated that Proxmire could not turn Hutchinson into a public figure by virtue of Proxmire's own allegations, because that would permit a

defendant to create a public figure defense through the defendant's own conduct. *Id.* at 135-36. And pointing to *Wolston's* emphasis on the term "public controversy" as limited to matters of public debate, the Court noted that Hutchinson did not thrust himself into the public eye "to influence others." *Id.*

This trilogy of post-*Gertz* cases — *Firestone*, *Wolston*, and *Hutchinson* — appears to take virtually all of the oxygen out of the one-sentence musing in *Gertz* hypothesizing the possibility of involuntary public figures. And for good reason — the suggestion in *Gertz* that an involuntary public figure could exist was never well-considered, and was entirely out of synch with the larger values that appropriately drove the *Gertz* decision.

C. The District of Columbia Circuit's Expansive View of Involuntary Public Figures

It is a fair characterization of the defamation jurisprudence of the District of Columbia Court of Appeals to say that it has been more extreme than any other American jurisdiction in its willingness to shear public figure doctrine from the moorings of voluntary entry into public debate. The expansive position of the District of Columbia Court of Appeals began with its highly controversial decision in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985). In its decision below, the Court of Appeals tried to distance itself from *Dameron*, claiming that it need not declare Lohrenz an "involuntary" public figure to declare her a public one.

But the Court of Appeals doth protest too much. For in the end, the *only* voluntary action undertaken by Lohrenz was to volunteer for naval combat aviation. Whether one calls this, in formal terms, the "involuntary public figure doctrine," or instead labels it as a doctrine permitting "constructive" public figure status by "voluntary acceptance of a job," the substance is the same. May a person, by the happenstance of job position alone, be forced to assume public figure status?

The *Dameron* case is worth specific attention. The case was brought by Merle Dameron, an air traffic controller.

The alleged defamation arose from an article in *The Washingtonian* magazine published on the crash of Air Florida Flight 90 at Washington's National Airport in 1982. Merle Dameron, however, had nothing whatsoever to do with the Air Florida crash. The offending article had ranged widely, and included a sidebar discussion of other plane crashes. In the course of that discussion the article asserted that air traffic controller error was assigned "partial blame" for the crash, eight years earlier, of a TWA 727 into Mt. Weather on its approach to Dulles Airport, killing 92 people. Dameron was the sole air traffic controller on duty at Dulles during the crash. In actual fact, controller error played no role in the crash. *Dameron*, 779 F.2d at 738. The Court of Appeals clearly regarded Merle Dameron as just an ordinary person, a good government employee, trying to do his job:

> He is an ordinary citizen who was completely unknown to the public before the Mt. Weather crash, never sought to capitalize on the fame he achieved through the Mt. Weather crash, and never acquired any notoriety apart from the crash.

Id. at 741. But despite Dameron's status as an "ordinary citizen," despite his undisputed failure to inject himself voluntarily into any public controversy, the Court held that he was a public figure, stating:

> Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person.

Id. The Court in *Dameron* then proceeded to adopt what has come to be known as the "sheer bad luck" doctrine, after what is probably the most famous (or infamous) passage of the opinion, in which the Court observed: "By sheer bad luck, Dameron happened to be the controller on duty at the time of the Mt. Weather crash." *Id.* at 742.

Carey Lohrenz was just a good naval aviator trying to do her job. That some segments of the public might be interested in how someone does one's job does not mean that one becomes a public figure for defamation purposes just by doing one's job. Many of us have jobs that might attract public attention, but this is not the same as voluntarily entering the arena of public discourse to attempt to influence the outcome of specific public controversies. *Gertz* itself stands solidly against this. Elmer Gertz was a very well-known Chicago attorney, a civil rights activist lawyer and author of several books. Gertz had taken on a case likely to generate media exposure. Despite all of this, the Court held that Gertz's actions were not enough to place him in the public domain: "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Gertz*, 418 U.S. at 352.[2]

The First Amendment should require that a public controversy be more than a generalized topic of public interest, such as "women in combat." To the extent there is an identifiable controversy here, it was triggered by the Hultgreen crash. Tellingly, Lohrenz's only connection to the Hultgreen crash was

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2. Lohrenz argued unsuccessfully to the Court of Appeals that there was a gigantic difference between *Dameron* and the case here, a difference that can be reduced to one poignant and pivotal point: Merle Dameron was on duty when a plane crashed, Carey Lohrenz was not. Merle Dameron was the air traffic controller handling the TWA flight that crashed into Mt. Weather; in contrast, when Kara Hultgreen crashed her plane while attempting a carrier landing, Carey Lohrenz was at the Miramar air base waiting to take off, and had no responsibility for or involvement in the Hultgreen incident. Even if this Court still finds the "sheer bad luck" doctrine persuasive, there is a giant divide between the "sheer bad luck" of being swept into an *actual newsworthy event* and the "sheer bad luck" of being swept into a defamatory vendetta. At most, *Dameron* ought stand for the proposition that if through misfortune a person plays a central role in a *newsworthy event* that triggers a public controversy, such as plane crash, he or she may become a public figure. It is wrong to *extend* the jurisprudence of the *Dameron* notion of "sheer bad luck" to instances such as those here, where the plaintiff played no role whatsoever, let alone no central role, in the precipitating event.

that Lohrenz was, with Hultgreen, one of the first female naval combat aviators. If this were the only nexus required by the First Amendment, however, the scope of involuntary public figures would become all but boundless. This would be to embrace a kind of guilt by association, in which *mere membership in a similarly situated class* would place one in a kind of defamation-free fire zone. That such a class will typically be defined by such identity characteristics as gender or ethnicity or race makes this extension of public figure doctrine especially indefensible. Lohrenz did not suffer the "sheer bad luck" of *direct personal involvement in a tragic incident* but "sheer bad luck one step removed." The connecting tissue was her gender, nothing more.

When Lt. Hultgreen died, Carey Lohrenz tried to simply remain quietly focused and go about her business. Exactly what more (or less) would society have her do? To treat Lohrenz as a public figure is far beyond any plausible understanding of what this Court's rulings in *Gertz*, *Firestone*, *Wolston*, or *Hutchinson* must have contemplated.

This Court ought not be deterred from addressing this important question by the manipulation of nomenclature. The ruling below is not grounded in anything other than the involuntary public figure doctrine, however much effort there was to obscure that fact. A rose is a rose by any other name. The Court of Appeals below did not claim that Lohrenz became a public figure through any voluntary entry into a public controversy to attempt to influence its outcome. As emphasized throughout this Petition, the flawed reasoning of the opinion below was that when Lohrenz suited up to fly naval jets in combat, public figure status came with the territory, and Lohrenz was appropriately swept into the fray when Lt. Hultgreen crashed and died. From Lohrenz' persepctive, this is nothing more nor less than the sheer bad luck doctrine and nothing more nor less than sheer bad law.

D. The Conceptual Flaws in Opinion Below

The analysis of the Court of Appeals was both quantitatively and qualitatively flawed. Quantitatively, the analysis allows for too many public figures. In setting the doctrinal parameters of the public figure concept in terms far too elastic, the Court of Appeals' analysis invites acceptance of a class of public figures far more expansive than anything that might plausibly have been contemplated by this Court in *Gertz*. The Court in *Gertz* must have intended that the class of involuntary public figures, *if it existed at all*, would be extremely small, as manifest in the Court's use of the word "hypothetically," and the phrase "exceedingly rare." *Gertz*, 418 U.S. at 345.

If all that is required to qualify as an involuntary public figure is the bad luck of some central connection to newsworthy event, involuntary figures are not by any calculation exceedingly rare, but exceedingly common, and growing more common all the time. *See with Wells v. Liddy*, 186 F.3d 505, 538-39 (4th Cir. 1999) ("We are hesitant to rest involuntary public figure status upon 'sheer bad luck.' *Gertz* tells us that involuntary public figures 'must be exceedingly rare,' and, unfortunately, bad luck is relatively common.") (internal citation omitted). Any of us, at any moment, might find ourselves swept up in some dramatic or traumatic event that becomes the focus of intense public inquiry or debate. The sad fact is that bad luck *is* relatively common, as the Fourth Circuit observed. New technologies make it increasingly routine, in this epoch of the "media feeding frenzy," the "fifteen minutes of fame," or the "media firestorm," for an obscure person who is just going about his or her business to suddenly be placed in a "central role" in some breaking story *du jour*. An ostensibly private person's life may be transformed into a public amusement park, the sudden subject of broadcasts around the world on satellite, radio, television, cable, and the Internet. Our First Amendment law must settle on whether it should serve as the hapless vassal to such phenomenon, or will instead assert itself, and anchor public figure doctrine in firmer moral and policy sensibilities.

The Court of Appeals' reasoning is also qualitatively flawed. For not only does it capture too many plaintiffs, it captures plaintiffs who do not deserve to be captured. It should take more to become a public figure than the misadventure of finding one's identity coercively commandeered by mass culture. A fundamental axiom of modern defamation law is that the media cannot "bootstrap" itself into the higher level of First Amendment protection granted in public figure cases by *itself* turning the plaintiff into a public figure by focusing attention on the plaintiff. *See Hutchinson v. Proxmire*, 443 U.S. 135-36 (1979). The ruling below is in irreconcilable tension with this axiom.

"Sheer bad luck" is a capricious and errant substitute for principles originally grounded in sound moral sensibilities and thoughtful constitutional policies. By definition luck (good or bad) is not the same as pluck. The public figure doctrine established in *Gertz* was properly grounded in a First Amendment balance of equity. If you can't stand the heat of the fire, stay out of the kitchen. If you enter the arena of discourse, expect the arena of discourse to enter you. The First Amendment is all about facilitating free expression, and those who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation. But when public figure doctrine status is triggered by sheer happenstance, First Amendment doctrine loses its tie to these constitutional equities.

E. The Opinion Below is a Silent Retreat to *Rosenbloom*

As many courts and commentators have argued, the involuntary public figure construct seems more philosophically *simpatico* with the repudiated philosophy of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), than the careful balance struck in *Gertz*. *See Wells v. Liddy*, 186 F.3d at 539 ("The *Dameron* definition of an involuntary public figure, someone who by bad luck is an important figure in a public controversy, runs the risk of returning us to the *Rosenbloom* plurality's conception of

defamation law."). *Rosenbloom* was overkill. Under its formulation, too many plaintiffs would be saddled with the actual malice standard, and the saddling of those plaintiffs would bear no relation to either their assumption of risks or their access to channels of media communication. Rosenbloom took the goal of facilitating free debate and discourse regarding resolution of public controversies out of the picture, by eliminating any nexus between the "newsworthiness" of a story and the plaintiff's role in voluntarily entering the arena of public debate regarding the story. This was the nexus that first *Gertz*, and later *Firestone*, *Wolston*, and *Hutchinson* restored.

F. Treating Lohrenz as a Private Figure Does Not Harm First Amendment Values

To repudiate the decision below will work no harm to central First Amendment values, to the free flow of information, or to the structural integrity of defamation law. Defendants will still be protected, under the negligence standard, the workhorse liability rule of tort law that is designed to assign liability to *unreasonable* behavior and excuse behavior that is reasonable. The negligence standard is hardly punitive or unfair. It is the standard approved for private figures in *Gertz*, and followed in all but a handful of American jurisdictions. It is not asking too much of defendants to exercise ordinary reasonable care before publishing defamatory statements about a private person. It is not asking too much of defendants such as Elaine Donnelly and the Center for Military Readiness to exercise ordinary reasonable care before targeting a conscientious naval aviator for a brazen defamation campaign that would drum her from the service and ruin her career.

Even if this Court is unwilling to take the step of rejecting outright the notion that there can ever be such a thing as an "involuntary" public figure, the Court ought to interpret that construct in a manner that will restrict its reach to only a tiny class of "exceedingly rare" plaintiffs. This Court might feel it safer to "never say never," and thus avoid absolutely foreclosing the possibility that in some exceptional case, an involuntary

public figure could exist. When, for example, a plaintiff has engaged in surreptitious illegal conduct, and is then exposed and caught out, the person might properly be deemed a public figure, although in a surface sense there was no voluntary entry into a public controversy. At most, however, this Court should only countenance the notion that a person may be an involuntary public figure when the plaintiff has played a *central role* in a public controversy, even if an involuntary one, and circumstances exist from which it may be said that the plaintiff *deliberately assumed the risk of media attention*, such as by either taking action to "prime the pump" of media attention or failing to take reasonable steps to deflect such attention. *See Wells v. Liddy*, 186 F.3d at 539-40. Most importantly, the reach of any such doctrine should be limited to the exceptionally narrow class of cases in which, notwithstanding the involuntary status of the plaintiff, the plaintiff may still fairly be said to have satisfied the moral and public policy rationales that undergird *Gertz*, both assuming the risk of media attention and possessing ready access to the channels of public discourse. *See Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 79 Cal. Rptr. 2d 178, 965 P.2d 696, 702 (1998) (holding that the characterization of someone as involuntary public figure must be reserved for those individuals who satisfy both of *Gertz's* supporting grounds), *cert. denied*, 526 U.S. 1114 (1999).

II. THE PETITION SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN FEDERAL CIRCUITS AND AMONG MANY FEDERAL AND STATE COURT DECISIONS

Lower court decisions are in conflict and confusion regarding involuntary public figure status. As one academic commentator recently summed up the state of play on this issue:

> The involuntary public figure was mentioned in one sentence in *Gertz v. Robert Welch, Inc.* Confusion over involuntary public figures was almost instantaneous. Some lower appellate courts held that the Supreme Court had created two categories of

> public figure status; others said there were three. Unfortunately, arguments can be made for either interpretation and, as a result, libel law is done a disservice by the absence of clear guidance. The involuntary public figure — in whatever form it takes — has become an important part of libel law, though courts are having a difficult time deciphering its form. Had the Supreme Court dealt more substantively with the idiom, it could have provided a significant additional piece in the libel puzzle. The time has come for the Court to do just that.

W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 Cardozo Arts & Ent. L. J. 1, 2 (2003) (Footnote citations omitted). At least twenty-three lower court decisions have attempted to apply the involuntary public figure doctrine since *Gertz*, and the pattern of decisions is in doctrinal disarray.[3]

Among the federal Circuits, the most sharply-defined conflict is that between the Court of Appeals for the District of Columbia and the Court of Appeals for the Fourth Circuit.

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3. By Professor Hopkins' calculations,

> over the quarter-century following *Gertz*, some twenty-three courts have struggled with the involuntary public figure doctrine in more than thirty cases, identifying plaintiffs as involuntary public figures nine times and applying an involuntary public figure examination, but ruling that libel plaintiffs were private persons rather than involuntary public figures, another nine times. In yet another nine cases, courts have recognized the viability of involuntary public figure status, but held that the category of public figure status did not apply to the facts in the cases at bar. Two other courts have acknowledged that involuntary public figures may have once existed, at least hypothetically, but indicated that the Supreme Court, in effect, abandoned that category in its *Firestone*, *Wolston*, and *Hutchinson* rulings."

W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 Cardozo Arts & Ent. L. J. 1, 21-22 (2003) (Footnote citations omitted).

Compare Dameron v. Washington Magazine, Inc., 779 F.2d 736, 741-42 (D.C.Cir.1985) *with Wells v. Liddy*, 186 F.3d 505, 538-40 (4th Cir. 1999) ("The district court . . . concluded that Wells was an involuntary public figure. . . ., applying *Dameron* . . . . Because we conclude that 'misfortune' is but one aspect of the considerations that should be weighed before concluding that an individual is an involuntary public figure, we are not persuaded . . . .").

The United States Court of Appeals for the Ninth Circuit has characterized this as an "intercircuit conflict." *See Flowers v. Carville*, 310 F.3d 1118, 1129 n.7 (9th Cir. 2002). ("By tape recording Clinton's phone calls and holding a press conference to play them, Flowers voluntarily injected herself into the fray, or at least threw kerosene on the flames once the conflagration was underway. We can therefore stay clear of the intercircuit conflict over purely involuntary public figures."), *citing and contrasting Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 741-42 (D.C. Cir. 1985) *with Wells v. Liddy*, 186 F.3d 505, 538-40 (4th Cir. 1999)

Many courts and many commentators have noted the confusion in the decisional law. A sampling of the holdings and comments from various lower court decisions testifies to the depth of this confusion. *See, e.g.*, *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), ("[s]o rarely have courts determined that an individual was an involuntary public figure that commentators have questioned the continuing existence of that category." *Id.* at 538, *citing* Rodney A. Smolla, *Law of Defamation* § 2.14 (1998); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (*Firestone* "forecloses the possibility" of the involuntary limited-purpose public figure); *Wilson v. Daily Gazette Company*, 588 S.E.2d 197, 208 (W. Va. 2003) ("The involuntary public figure doctrine has its origins in one sentence from the United States Supreme Court decision in *Gertz*: . . . only a handful of courts have ever found a plaintiff to be an involuntary public figure."); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (wife of Johnny Carson held

to be an involuntary public figure); *Zupnik v. Associated Press, Inc.*, 31 F. Supp.2d 70, 73 (D. Conn. 1998) (wife involuntary public figure because of spouse's notoriety); *Daniel Goldreyer, Ltd. v. Dow Jones & Co., Inc.*, 259 A.D.2d 353, 687 N.Y.S.2d 64, 65 (1999) (art restorer held to be involuntary public figure); *Bay View Packing Co. v. Taff*, 198 Wis.2d 653, 543 N.W.2d 522, 532-34 (Ct. App. 1995) (holding food processing company was involuntary public figure, noting that "[g]enerally, to be considered a limited purpose public figure, a person must have 'thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved'" but then holding that "This one factor, however, is not the be-all and end-all of public figure status."); *Scaccia v. Dayton Newspapers, Inc.*, 2001 WL 1517043, *9 (Ct. App. Ohio 2d Dist. Nov. 30 2001) (holding it may be possible for an individual to become a public figure through no purposeful action of his own.); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (Finding that children of notorious Rosenberg defendants were cast into the limelight and became public figures under the *Gertz* standards); *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238 (5th Cir. 1980) (husband of a woman who once dated Elvis Presley was a public figure for purposes of an article claiming, incorrectly, that the couple were divorced and that she had reunited with Presley); *Wagstaff v. The Morning Call*, 41 Pa. D. & C. 4th 431, 439 (Ct. Com. Pl. 1999) (involuntary public figures may exist); *Jacobson v. Rochester Communications Corporation, Inc.*, 410 N.W.2d 830, 835 (Minn. 1987) (allowing involuntary public figures would not be consistent with *Gertz*, *Firestone*, and *Wolston*.); *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*, 159 Cal. Rptr. 131, 138 (Cal. Ct. App. 1979) (holding that, hypothetically, it may be possible for there to be an involuntary public figure, but that the Supreme Court seemed to retreat from that suggestion in *Firestone*); *Dombey v. Phoenix Newspapers, Inc., 150* Ariz. 476, 480, 724 P.2d 552, 566 (1986) (involuntary public figure doctrine has never been applied by the Supreme Court

and may have been abandoned); *Della-Donna v. Gore Newspapers Company*, 489 So.2d 72, 77 (Fla. D. Ct. App. 4th Dist. 1986) ("Della-Donna forgets that 'it may be possible for someone to become a public figure through no purposeful action of his own. . . ."); *Atlanta Journal-Constitution v. Jewell*, 252 Ga. App. 808, 820, 555 S.E.2d 175, 186, *cert denied*, 537 U.S. 814 (2002) (citing *Dameron* involuntary public figure construct with approval).[4]

The scholarly commentary mirrors these divisions. *See, e.g.*, David Elder, *Defamation: A Lawyer's Guide*, § 5:8 at 57 (1993) ("case law and majoriatiran view of the commentators correctly view this category as not merely 'exceedingly rare' but extinct."); Gerald Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 Minn. L. Rev. 645, 681 n.175 (1977) (Supreme Court "eliminated the possibility that a person may become an involuntary public figure"); Mark Rosen, *Media Lament-The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487, 502 (1980) (stating that involuntary public figure classification is "all but extinct"); David Wallis, *The Revival of Involuntary Limited-Purpose Public Figures-Dameron v. Washington Magazine, Inc.*, 1987 B.Y.U. L. Rev. 313, 319 (describing *Wolston* as "further evidence of the demise of the involuntary public figure category"); Mark Karinja, Comment, *Defamation: Conflict in the Definition of "Public Figure,"* 10 Seton Hall L. Rev. 822, 846 (1980) (describing Supreme Court as rejecting the involuntary public figure concept

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4. The *Jewel* case, in which this Court denied a Petition for a Writ of Certiorari, did not present the conflict with a clean record such as that presented here. *See Atlanta Journal-Constitution v. Jewell*, 252 Ga.App. 808, 555 S.E.2d 175, *cert denied*, 537 U.S. 814 (2002). In *Jewel*, Mr. Jewel had participated in a series of high-profile media interviews, including television interviews on major network news programs, following the bombing incident at the Atlanta Olympics. The Georgia state court judgment rested primarily on these voluntary media appearances. In contrast, the Court of Appeals here did not rely at all on media appearances or any other voluntary participation in media debate by Lohrenz.

"*sub silentio*"); Dale Nichols, Note, *The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?*, 14 U. Mich. J. L. Reform 71, 84 (1980) (suggesting that combination of *Firestone*, *Hutchinson*, and *Wolston* have dealt the involuntary public figure classification a "death blow"); Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell Is a Public Figure Is Wrong and Harms Journalism*, 22 Loy. L.A. Ent. L. Rev. 293, 310-13 (2002) (discussing the state of the involuntary public figure doctrine in defamation law in the context of whether Richard Jewell should be held to be an involuntary public figure for purposes of his defamation action against the Atlanta Journal Constitution); Aureliano Sanchez-Arango, Casenote, *The Elusive "Involuntary Limited Purpose Public Figure": Why the Fourth Circuit Got it Wrong in Wells v. Liddy*, 9 Geo. Mason L. Rev. 211, 221-227 (2000); W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 Cardozo Arts & Ent. L. J. 1 (2003) (demonstrating that involuntary public figure doctrine is alive and that lower courts are split).

The conflict among lower courts as what to make of the mention of the involuntary figure notion in *Gertz* is understandable. In fairness to the nation's lower courts, to a significant degree this is a conflict of this Court's own making. This is all the more reason for this Court to straighten matters out. Such clarification of the language of *Gertz* would not mark the first time this Court has stepped in to pull in the reigns on some of the *Gertz* opinion's more expansive language. Another famous passage in *Gertz*, opining that "[u]nder the First Amendment there is no such thing as a false idea," *Gertz*, 418 U.S. 338, similarly set sail a whole body of lower court precedent announcing a free-standing First Amendment guarantee protecting the expression of "opinion." In *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990), this Court trimmed that sail, explaining that this one rhetorical statement in *Gertz* was never intended to generate any such doctrine. *Id.* at 19 ("We are not persuaded that, in addition to these protections, an additional

separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment.").

The stakes here are actually much higher. *Milkovich* was largely a nuanced case that fine-tuned one aspect of *Gertz*, making a relatively minor adjustment between the protections independently emanating from the First Amendment and the protections that already existed at common law. The public figure doctrine, however, is unknown to the common law. An overly generous interpretation of the scope of the public figure doctrine has a profound negative impact on the capacity of individuals who chose to serve society but who *do not* choose to enter the arena of public debate. The need for this Court to intervene and pull back on an overly exuberant strain of public figure doctrine is thus even more compelling than the need for this Court's intervention that existed in *Milkovich*.

The high level of constitutional protection produced by the actual malice standard applicable to defamation actions brought by public officials and public figures is unquestionably justified by our profound national commitment to freedom of speech. But as this Court saliently observed in *Milkovich*, "there is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Id.*, *quoting Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

The "other side to the equation" is especially worth preserving in these times. Millions of quiet, hard-working Americans serve in the public and private sector as police officers, firefighters, servicemen and servicewomen, corporate employees, teachers, lawyers, medical providers — a virtually infinite parade of people holding a virtually infinite array of jobs. They are not by any common parlance or understanding "public figures." Yet we live in a world in which at any given moment events may suddenly and without warning place them

in the glare of a media feeding frenzy, as some tragic or heroic action puts them on millions of Internet or television screens.

We must not lose our compass here. The public figure doctrine was grounded in two laudable rationales that serve our robust commitment to freedom of speech, the notions that when one enters the fray of public discourse one "assumes the risk" of critique and also reaps the benefit of access to channels of communication. When we turn otherwise private persons into public figures for reasons divorced from these rationales, we put matters out of kilter. The benefits to a healthy public discourse from such a forced march are minimal, the sacrifices to human dignity severe. The opinion below partakes of this imbalance, and the time has come for this Court to set the balance right.

CONCLUSION

For the foregoing reasons, Petitioner Carey Lohrenz respectfully urges this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED DECEMBER 12, 2003

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 19, 2003 Decided December 12, 2003

No. 02-5294

CAREY DUNAI LOHRENZ,

APPELLANT

v.

ELAINE DONNELLY, CENTER FOR MILITARY READINESS, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 96cv00777)

Before: ROGERS and ROBERTS, *Circuit Judges,* and SILBERMAN, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

Appendix A

ROGERS, *Circuit Judge:* The principal issue in this appeal is the scope of the voluntary limited-purpose public figure doctrine. Carey Dunai Lohrenz became one of the first two women combat pilots in the United States Navy at a time when there was a public controversy about the appropriateness of women serving in combat roles. In appealing the grant of summary judgment on her defamation complaint against Elaine Donnelly and the Center for Military Readiness ("CMR"), Lohrenz contends that, because she was simply doing her job and was at most a peripheral figure in the controversy about whether the Navy was applying a double standard for women combat pilots, the district court erred in ruling she was a public figure. To the extent that the court might hold that she was an involuntary limited-purpose public figure, Lohrenz attacks this court's application of that doctrine in *Dameron v. Washington Magazine,* 779 F.2d 736 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1141 (1986), and urges that its application be limited or the case overruled. Finally, Lohrenz contends that the district court erred in finding that she failed to present evidence from which a reasonable jury could find by clear and convincing evidence that Donnelly and CMR published the alleged defamations with actual malice.

Because Lohrenz's evidence shows that she chose the F–14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F–14 combat aircraft rings hollow: she chose combat training in the F–14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the

territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she "suited up" as an F–14 combat pilot. Therefore, because the alleged defamations were germane to her position as a woman combat pilot, we hold that the district court did not err, upon applying the three-part test of *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), in ruling that Lohrenz was a limited-purpose public figure. Hence, we do not reach Lohrenz's challenge to the analysis in *Dameron*, which only the en banc court can properly entertain. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). Further, because a review of the evidence, again viewed in the light most favorable to Lohrenz, shows that she failed to meet the stringent standard established by the Supreme Court for public figures, who must demonstrate by clear and convincing evidence that defamation defendants acted with actual malice, we affirm the judgment of the district court.

I.

Upon *de novo* review of the grant of summary judgment, *see Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994), the evidence, viewed in the light most favorable to Lohrenz as the non-moving party and drawing all reasonable inferences in her favor, *see Forman v. Small*, 271 F.3d 285, 291 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); Fed. R. Civ. P. 56(c), shows the following:

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Carey Dunai Lohrenz served as a member of the United States Navy following graduation from college in 1990, and continued to serve in the Navy until early 1999. She graduated from Aviation Officer Candidate School with academic honors and received her commission on May 17, 1991. She successfully completed Primary Flight Training on February 3, 1992 with first place honors (Commodore's List). As was tradition, in light of Lt. Lohrenz's graduation in the top ten percent of her class at Primary Flight School, the Navy recognized her superior performance as a student pilot by assigning her to be trained in a preferred class of aircraft. Lt. Lohrenz selected jets from among several alternatives. Following completion of Intermediate and Advanced Training, she received her designation as a naval aviator on June 25, 1993.

At the end of advanced jet training, pilots were given one opportunity to suggest which particular jet they would like to pilot. Shortly before she had to make her choice, a personnel specialist in the Bureau of Naval Personnel advised Lt. Lohrenz that, because women jet pilots were only permitted to fly noncombat planes and all noncombat jets were being decommissioned, the Navy had no place for women jet pilots; she could either temporarily serve as a flight instructor or leave the Navy. However, in the intervening days, the Navy changed its policy, and permitted women to train for combat aircraft. As Lohrenz alleged in her complaint, she then "chose combat aviation." Amended Complaint ¶ 22. In June 1993, the Navy assigned Lt. Lohrenz to the West Coast F–14 program. Along with Lt. Kara Hultgreen, an experienced Navy pilot, Lt. Lohrenz began training in the F–14 Tomcat fighter jet in July 1993.

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The Navy's decision to assign Lt. Lohrenz and Lt. Hultgreen as the first women to pilot United States armed forces combat aircraft occurred amidst an ongoing public controversy about the appropriateness of women serving in combat roles in the military. A subcontroversy concerned whether the military should relax physical strength and other standards to account for differences between male and female members of the armed services. And another subcontroversy related to whether women should serve as combat pilots in particular. These controversies persisted even after 1991, when Congress repealed the law barring women from combat fighters and bombers, and after April 1993, when, on the heels of the Tailhook scandal involving allegations that Navy officers had sexually harassed enlisted women, the Secretary of Defense lifted the Defense Department's ban on women serving in such positions.

Although she never initiated any contacts with the media prior to the alleged defamations, Lt. Lohrenz's new combat assignment made a few headlines. Her hometown newspapers in Green Bay and Milwaukee, Wisconsin published brief human interest stories about her and her family members, most of whom have been military pilots. Further, in response to Navy encouragement that Lt. Lohrenz did not feel at ~~liberty~~ to decline, she granted an interview to KNSD–TV, a local San Diego, California station. Also, *The Compass*, a publication for the naval community in San Diego where Lt. Lohrenz was posted, covered her assignment to the F–14. Lt. Lohrenz explained in *The Compass* that the Navy's decision to allow her to choose combat aircraft came as a great relief; she had been "in tears" because she "couldn't believe that all the guys [she] had gone through flight school

with, and had worked so hard and competed with and done well, were going to go out to the fleet and get a chance and [she] wasn't going to have [her] chance." Scott D. Williams, *First Women Join Fleet Fighter Squadron: The Jet Doesn't Know the Difference,* The Compass, Sept. 9, 1994, at A1. Her Commanding Officer, however, succeeded in deflecting most of the media attention directed at her. This changed after October 28, 1994.

After eleven months of training in the F–14, Lieutenants Hultgreen and Lohrenz satisfied requirements for posting with a carrier-based flight squadron. In August 1994, the Navy assigned both women to fighter Squadron 213 attached to the U.S.S. Abraham Lincoln in the Pacific Fleet. They participated in regular training exercises to maintain their combat readiness. In the course of such an exercise, on October 28, 1994, Lt. Hultgreen died while attempting to land an F–14 on the U.S.S. Lincoln; the Navy subsequently determined that the plane did not signal to the pilot that one of its engines was not working until it was too late to avoid a crash. After Lt. Hultgreen's death, the media turned its attention to the question of whether the Navy had established a "double standard" in order to enable women to qualify as combat pilots, initially focusing on Lt. Hultgreen. Three months after Lt. Hultgreen's crash, Elaine Donnelly, who had long opposed permitting women to serve in combat positions, drew attention to Lt. Lohrenz. Starting in the 1970s, Donnelly had testified before Congress in opposition to women in combat, published on the subject, and, in the early 1990s, served on the Presidential Commission on Assignment of Women in the Armed Services. In 1992, Donnelly incorporated the Center for Military Readiness and served

as its president; the CMR has regularly published articles and issued press releases opposing women serving in combat positions, including as combat pilots. As relevant here, Donnelly and CMR published four allegedly defamatory publications about Lt. Lohrenz.

First, on January 16, 1995 Donnelly wrote on CMR letterhead to Senator Strom Thurmond to alert the then-Chairman of the Senate Armed Services Committee to "certain practices designed to assure that women will not fail [that] have now been extended to the demanding and dangerous field of carrier aviation in the F–14 community." Donnelly characterized both Lt. Hultgreen and the other woman combat pilot, "Pilot B," as unqualified pilots. She quoted at length from a letter she had received from Lt. Patrick Jerome Burns, who had briefly been an F–14 instructor for both women; however, she did not then identify Lt. Burns by name. Donnelly and Lt. Burns cast the Navy's decision to break down a gender barrier and permit women pilots to fly combat aircraft as "politically driven." They wrote, "Navy policy on the integration of women into fleet F–14 squadrons is, thus far, an abject failure. It is indicative of the problems of gender integration, which must be corrected, across the spectrum."

Second, a few months later, on April 25, 1995, Donnelly republished the letter to Senator Thurmond as part of a more comprehensive CMR "special report" on alleged double standards in naval aviation. The Donnelly Report included excerpts from Lt. Lohrenz's confidential training records, parts of which had been sent to Donnelly by Lt. Burns. The Donnelly Report reiterated that Lt. Hultgreen and Pilot

B were unqualified pilots, and noted special accommodations the Navy had made for Pilot B. The Report also referenced several of the Navy's specific rejections of Donnelly's conclusions. The Donnelly Report was circulated to the media, online, and within the naval aviator community, including on the U.S.S. Lincoln, where Lt. Lohrenz was still based. Even though Lt. Lohrenz was referred to in the Donnelly Report as "Pilot B," as the only remaining carrier-qualified woman F–14 pilot, her identity was known within the naval aviation community, particularly on the U.S.S. Lincoln. Shortly thereafter, the media revealed Lt. Lohrenz's name. *See, e.g.*, James W. Crawley, *Navy Grounds Female F–14 Pilot for Evaluation of Flying Skills*, San Diego Union–Trib., June 30, 1995, at B–1.

Third, almost a year later, on March 28, 1996, Donnelly restated her conclusion that Lt. Lohrenz was an incompetent combat pilot in a speech at the Army–Navy Club in Washington, D.C. Fourth, twenty months later, on November 6, 1997, after Lt. Lohrenz had filed suit, Donnelly repeated this conclusion in a CMR press release, referring to Lt. Lohrenz by name. The press release further asserted that the Navy's integration of women into combat squadrons was part of a "reckless" "race" with the Air Force that had been "instigated by aggressive female officers, feminist advocates, and Navy public affairs officers."

On April 24, 1996, Lt. Lohrenz filed a defamation action against Donnelly and CMR as well as the Copley Press (d/b/a *The San Diego Union Tribune*), News World Communications, Inc. (d/b/a *The Washington Times*), and John Does 1–100 (retired officers of the Navy and other

military services, who allegedly assisted Donnelly and republished her statements). Lohrenz alleged in her complaint that she had become the victim of a campaign by Donnelly and the other defendants, "the gist of which was that the Navy engaged in preferential treatment of female aviators, passing and promoting them despite their substandard performance." Appellant's Br. at 2. Lt. Lohrenz sued the three non-press defendants, Donnelly, CMR, and the John Does, for libel and slander. Her complaint also included causes of action for libel against the two media defendants, and an invasion of privacy claim against all defendants.

Lt. Lohrenz sought compensatory and punitive damages of not less than $50,000 in view of the injuries proximately caused, including her removal from flight status by the Navy on May 30, 1995. Whereas she had been evaluated as an above-average pilot until the publication of The Donnelly Report, her instructors gave her only average marks in April and May 1995. Lt. Lohrenz further alleged that despite the conclusion of a Field Naval Aviation Evaluation Board that she received no preferential treatment, was a qualified pilot, and should have her flight status reinstated but be assigned to a different aircraft, she had been unable to obtain reinstatement as any type of naval aviator because of the damage done to her reputation as a fighter pilot by the false and defamatory statements of the defendants. Although two years later the Navy Inspector General overturned the Board's decision that Lt. Lohrenz be assigned to fly in a different aircraft and also found that the failure to return her to flight status lacked substantial justification, Lt. Lohrenz was never again assigned to fly a naval combat plane. As a result of being out of the field for two years, Lt. Lohrenz alleged, she lost her career as a naval aviator.

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The district court entered summary judgment for Donnelly and CMR. *Lohrenz v. Donnelly,* 223 F. Supp. 2d 25 (D.D.C. 2002). The court ruled that Lt. Lohrenz had become a limited-purpose public figure, albeit possibly involuntarily, *id.* at 44, and had failed to meet her burden to show that Donnelly and CMR had published the defamatory material with actual malice, *id.* at 58. The court found that Lt. Lohrenz was a public figure because of her past conduct, including taking on a role as one of the first two women combat pilots, her numerous appearances in the media before and after Lt. Hultgreen's crash, and the fact that "she was a forerunner in the military's attempt to integrate women into combat positions." *Id.* Rejecting Lohrenz's argument that notwithstanding numerous interviews she had not "thrust" herself into the media spotlight, the district court pointed to *Dameron,* 779 F.2d 736, stating that it was "well-settled that private individuals may become limited-purpose public figures unwillingly without voluntarily thrusting themselves into the public eye." *Id.* The court, citing *Clyburn v. News World Comm., Inc.,* 903 F.2d 29, 33 (D.C. Cir. 1990), also noted she "voluntarily gave statements about her F–14 assignment" and "was well-aware that her position as one of the first women F–14 pilots would attract public attention." *Id.* The court, therefore, concluded that as "a central figure in the public controversy over the place of women in the military" and given the media coverage in which she was often "featured prominently," Lt. Lohrenz was a limited-purpose public figure. *Id.* The district court, having found that Lohrenz failed to meet her burden to prove actual malice, rejected the alternative defense that the published allegations were substantially true, *id.* at 59, and did not reach the fair reporting defense based on the Navy Inspector General's

Report, *id.* at 60. The district court had previously dismissed the complaints against the Copley Press for lack of jurisdiction, *Lohrenz v. Donnelly,* 958 F. Supp. 17 (D.D.C. 1997), and against the John Does, who were never identified, *Lohrenz v. Donnelly,* No. 96–777 (D.D.C. Aug. 16, 2002) (order of dismissal). News World Communications, Inc. settled Lt. Lohrenz's complaint against it. *Lohrenz,* 223 F. Supp. 2d at 30.

II.

On appeal, Lohrenz contends that the district court erred in ruling, under *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1296–1300 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 898 (1980), that she was a limited-purpose public figure, albeit possibly involuntarily. Devoting precious little of the argument in her brief to an examination of the district court's application of the three-part test of *Waldbaum,* Lohrenz does not challenge the appropriateness of *Waldbaum*'s analysis of the voluntary limited-purpose public figure doctrine, acknowledging that it was "faithful to the balance struck in *Gertz.*" Appellant's Br. at 21. Rather, Lohrenz's brief focuses on the involuntary public figure analysis in *Dameron v. Washington Magazine,* 779 F.2d 736, 741–42 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1141 (1986), which, she contends, is "fundamentally unsound." Appellant's Br. at 5. She maintains that because she was "at most on the broad periphery of a broad debate that intensified when a different female aviator lost her life in a crash," she is not a public figure under *Dameron. Id.* at 5–6. Lohrenz also contends that, even if the court determines she is an involuntary public figure, the district court erred in

ruling that she failed to present evidence from which a reasonable jury could find that Donnelly and CMR acted with actual malice in publishing defamatory statements about her, and hence summary judgment was inappropriate. Lohrenz does not challenge the district court's resolution of her invasion of privacy claims.

As a threshold matter, Lohrenz's focus on the involuntary public figure doctrine in *Dameron* is misplaced, because the evidence, viewed in the light most favorable to her, shows that Lt. Lohrenz was a voluntary limited-purpose public figure. In *Waldbaum,* the court addressed the question of "when an individual not a public official has left the relatively safe harbor that the law of defamation provides for private persons and has become a public figure within the meaning of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)." *Waldbaum,* 627 F.2d at 1289. Eric Waldbaum was the president and chief executive officer of a diversified food cooperative that ranked second largest in the country. He played an active role in setting the policies and standards within the supermarket industry: "He battled the traditional practices in the industry and fought particularly hard for the introduction of unit pricing and open dating in supermarkets." *Id.* at 1290. He held several meetings to which the press and public were invited, and his policy of consolidation to eliminate unprofitable outlets generated considerable comment in the affected area and in trade journals as well as general interest publications, such as the *Washington Post. Id.* & n.3. Waldbaum sued for libel when a trade publication reported that he had been dismissed by the Board of Directors and that the cooperative " 'has been losing money the last year and retrenching.' " *Id.* The district court

ruled that Waldbaum was a public figure for purposes of the limited range of issues concerning the company's unique position within the supermarket industry and his efforts to advance that position. *Id.* at 1291.

This court affirmed. In concluding that "a person has become a public figure for limited purposes if he has attempted to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants," *id.*, the court established a threepart test: (1) The court must isolate the public controversy, that is, "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Id.* at 1296. (2) The court must analyze the plaintiff's role in it. "Trivial or tangential participation is not enough. . . . [To be a limited-purpose public figure, a plaintiff] must have achieved a 'special prominence' in the debate." *Id.* at 1297 (citation omitted). The court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct or statements. *Id.* The court noted that a plaintiff "would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases." *Id.* at 1297 n.27. (3) Finally, the court must determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. *Id.* at 1298. In the end, the court concluded that notwithstanding Waldbaum's active role and involvement with the media, he was a limited purpose public figure only for the purposes of the subcontroversy about his supermarket innovations. *Id.* at 1300.

We are mindful that, although *Waldbaum* "provides us with useful analytic tools[,] nevertheless, the touchstone remains [the standard the Supreme Court set forth for classifying an individual as a public figure, namely] whether an individual has 'assumed [a] role[ ] of especial prominence in the affairs of society . . . [that] invite[s] attention and comment.' *Gertz,* 418 U.S. at 345." *Tavoulareas v. Piro,* 817 F.2d 762, 773 (D.C. Cir. 1987) (en banc). In *Gertz,* the Supreme Court balanced the constitutional commitment to free speech and press and the interests served by the defamation law in protecting the dignity and worth of every human being, 418 U.S. at 341, and set the dividing line between public and private figures based on those who assumed the risk of publicity and had access to channels of communication to defend themselves, and those who did not, *id.* at 344. The Court in *Gertz* rejected the plurality's broad view in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), that the actual malice standard applied if the relevant controversy "is a matter of public or general concern without regard to whether the persons involved are famous or anonymous." *Id.* at 44.

Concluding that the *Rosenbloom* approach paid inadequate attention to the State's interest in protecting private persons from defamatory injury, *Gertz,* 418 U.S. at 346, the Court observed that while some persons would be public figures by virtue of their positions of "persuasive power and influence," typically, public figures will be persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

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As applied here, *Waldbaum*'s analysis is faithful to *Gertz*. The first and third prongs of the *Waldbaum* test are essentially uncontested by Lohrenz, for she concedes there was a public controversy about women in combat and also about the circumstances surrounding Lt. Hultgreen's death, *see* Appellant's Br. at 32–33, and the alleged defamatory statements by Donnelly and CMR plainly were germane to the subcontroversy about women combat pilots and the Navy's alleged double standards. *See Lohrenz v. Donnelly*, 223 F. Supp. 2d at 44. Thus, the remaining question is whether Lt. Lohrenz, at the time she became an F–14 combat pilot, achieved "a 'special prominence' in the debate," thereby satisfying *Waldbaum*'s second prong. 627 F.2d at 1297. She both rejects that conclusion, maintaining that she was only trying to do her job and her involvement in the public controversy was tangential at best, *see* Appellant's Br. at 32, and contests whether the general controversy about women in combat was sufficiently linked to her performance as an F–14 combat pilot to render her a public figure. *Id.*

To satisfy the *Waldbaum* inquiry's " 'special prominence' " requirement, "[t]he plaintiff must either have been purposefully trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." 627 F.2d at 1297. This phrasing incorporates both *Gertz*'s analysis that, through "purposeful action of his own," 418 U.S. at 345, a plaintiff attains a position in the limelight, *see, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154 (1967), as well as *Gertz*'s general observation that the media is entitled to act on the assumption that public officials and public figures have exposed themselves to increased risk of

injury from defamation. 418 U.S. at 345. Although, as we understand Lohrenz's position on appeal, it was the Navy, not she, that placed her at the center of the controversy about women as combat pilots, the evidence, construed in the light most favorable to her, does not support her position. Lohrenz not only alleged that she "chose to be trained in combat aviation," Amended Complaint ¶ 22, her actions and statements belie any basis on which to conclude that she did not voluntarily seek to be in the combat pilot position to which the Navy assigned her. Once she "chose . . . combat aviation" by indicating her preference for the F–14 while knowing of the preexisting public controversy over the appropriateness of women in combat positions, Lt. Lohrenz assumed the risk that if she succeeded in qualifying for a combat assignment and the Navy made such an assignment, she would find herself at the center of the controversy as a result of the special prominence that she and only one other woman combat pilot attained upon receiving their F–14 assignments. That Lt. Lohrenz might have preferred a combat assignment that did not place her in the center of the public controversy is legally irrelevant.

Under the circumstances, Lohrenz's contention that she was, in effect, an anonymous Navy pilot, rings hollow as there is no evidence to support such a conclusion. By choosing to remain in the Navy as a combat pilot, and indicating her preferences among combat aircraft, Lt. Lohrenz became a limited purpose public figure at the point she "suited up" as an F–14 pilot. "[A] reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy [about the appropriateness of women serving in

combat roles]." *Waldbaum,* 627 F.2d at 1298. By choosing a path of endeavor as a combat pilot she assumed the risk that she would attain such an assignment, which, in light of the public controversy, meant she would be in a position of special prominence in that controversy. So long as defamatory statements made about her were germane to her role in that controversy, the *Waldbaum* inquiry is satisfied, and she is a voluntary public figure for the limited purpose of the debate about whether and how women should be integrated into combat aviation roles. And, as the district court found, after the crash of Lt. Hultgreen's F–14, Lt. Lohrenz also became a central figure in the subcontroversy about whether the Navy was applying double standards for its women combat pilots. At both points, when she was assigned to the F–14 and in the aftermath of Lt. Hultgreen's crash, Lt. Lohrenz was a public figure whose performance would be of interest to the public. *See Gertz,* 418 U.S. at 344–45; *Waldbaum,* 627 F.2d at 1297.

Lohrenz fails in her attempt to suggest that her position was no different than that of the criminal trial attorney in *Gertz* or the consultant in *Clyburn,* 903 F.2d 29, who hobnobbed with government officials. In neither of those cases was there a preexisting public controversy comparable to that of which Lt. Lohrenz was aware when she "chose to be trained in combat aviation." Moreover, to the extent Lohrenz contends that the district court erred in "allowing the undeniable 'public interest' in the *general question* of 'women in combat' to morph into the public controversy germane to Lohrenz's defamation claim, which should have been focused on a public controversy *regarding the fitness or competence of Carey Lohrenz herself,*" Appellant's

Br. at 32, she ignores that the substance of the controversy about the appropriateness of women in combat positions embraced concerns about Lt. Lohrenz's performance as a pathbreaking woman combat pilot of unknown ability. In sum, the evidence, viewed most favorably to Lohrenz, fails to show the media was not entitled to assume that she had voluntarily exposed herself to an increased risk of injury from defamatory falsehoods about her role as a combat pilot.

With this conclusion, the court has no occasion to hold that either her earlier conduct or the media coverage following her assignment to the F–14 showed that Lt. Lohrenz was wellknown or attempting to influence a public controversy, *see Wolston,* 443 U.S. at 167–68; prior to "suiting up" as an F–14 pilot, she had not been a general-purpose public figure or a voluntary limited-purpose public figure. *See Gertz,* 418 U.S. at 351–52. Neither her Navy enlistment and non-combat pilot training, which did not render her "fam[ous]" or "notori[ous]", *see id.,* nor her mere acquiescence to press inquiries fairly characterized as of a hometown-girl human interest variety, *see Waldbaum,* 627 F.2d at 1298 n.31, nor her attempts to defend herself through the media against allegedly defamatory statements by Donnelly and CMR, *see id.* at n.34; *cf. Time, Inc. v. Firestone,* 424 U.S. 448, 454 n.3 (1976), rendered her a public figure. Instead, it was her voluntary act of "cho[osing] combat aircraft," thereby assuming the risk of a combat assignment, followed by her "suiting up" as one of the first two American women combat pilots, that gave her " 'special prominence' " in the controversy about women in combat and established her voluntary limited-purpose public figure status.

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The result here is in accord with a principle alluded to by Justice Harlan in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 154 (1967) (with three Justices concurring and the Chief Justice concurring in the result), namely, the First Amendment requires that where, as here, recovery by a defamation plaintiff could be viewed as vindicating a government policy, a plaintiff must make the higher showing required by the actual malice standard. Further, our approach adheres to the principle that, unless a plaintiff accepted a role in which she reasonably could have been expected to play a role in resolving a controversy, *see Waldbaum,* 627 F.2d at 1297, merely accepting an anonymous assignment in an arena where there is a public controversy is not alone sufficient to transform a private person into a public figure. *Cf. Hutchinson v. Proxmire,* 443 U.S. 111, 134–35 (1979); *see also Gertz,* 418 U.S. at 352. Lt. Lohrenz was not just any fighter pilot; when she "suited up," she could reasonably have been expected to know that she was assuming a position of " 'special prominence' " in the controversy about women in combat roles. Again, it was not Lt. Lohrenz's decision to pursue a Navy career as a combat jet pilot that made her a public figure, but rather that in so doing she assumed the risk of success whereby she would become one of the first few women combat pilots and thus necessarily attain " 'special prominence' " in an ongoing public controversy about such opportunities. Finally, the result here is consistent with *Gertz*'s principle that only those with access to the media to defend themselves should be designated public figures. *See* 418 U.S. at 345. Lt. Lohrenz possessed ready access to the channels of public discourse, as evidenced not only by the media attention she received when first assigned as a combat pilot along with Lt. Hultgreen, but by her appearance on April 19, 1998, on the CBS television program *60 Minutes.*

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Our conclusion about Lt. Lohrenz's public figure status does not suggest that she was not a good naval aviator trying to do her job, and it does not penalize her for acting with "professionalism," *see* Appellant's Br. 32, 35. Lt. Lohrenz was confronted with the choice of piloting a supersonic combat fighter jet as a voluntary public figure, or giving up her dream of being a Navy pilot in order to remain a private figure. But given that potentially difficult choice, it was nonetheless she who "chose jets" when she knew there was a public controversy about women in combat, and she must live with the consequences of that choice and her resulting assignment as one of the first women combat pilots. We hold that as an F–14 combat pilot Lt. Lohrenz became a voluntary limited-purpose public figure. Therefore, we do not reach Lohrenz's attacks on *Dameron*.

III.

As a public figure, Lohrenz bore the burden of proving that Donnelly and CMR acted with actual malice, and not merely ordinary negligence, in publishing allegedly defamatory statements about her. The district court found that Lohrenz failed to present evidence from which a reasonable jury could so find. Lohrenz contends that the district court did not give her the benefit of the aggregate of her evidence, as she was entitled, *see, e.g., McFarlane v. Esquire Magazine,* 74 F.3d 1296, 1304 (D.C. Cir. 1996); *Tavoulareas v. Piro,* 817 F.2d 762, 794 n.43 (D.C. Cir. 1987) (en banc), and that she presented "highly probative" evidence of actual malice by showing that "Donnelly and CMR were on a mission to advance a preconceived story line, and may

have targeted Lohrenz to 'get' her out of their more generalized zeal to drum women from combat positions." Appellant's Br. at 38–39.

In a civil action where the subjective state of mind determination turns on credibility and nuance, Lohrenz's position that the issue should never have been decided on summary judgment has facial appeal. *See, e.g., Goldwater v. Ginzburg*, 414 F.2d 324, 336–37 (2d Cir. 1969). The difficulty in agreeing with her contention that the district court erred in granting summary judgment stems not from the general proposition she asserts but from the nature of the heavy burden she bears. To determine whether Lohrenz met her burden to show actual malice by Donnelly and CMR in publishing the alleged defamations, the court must be able to find that there is clear and convincing evidence "to permit the conclusion that the[y] in fact entertained a serious doubt as to the truth of [their] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In that regard, the Supreme Court acknowledged in *St. Amant* that:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. . . . *New York Times* [*v. Sullivan*, 376 U.S. 254 (1964)] and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care

> would protect against selfcensorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

Id. at 731–32.

In the two decades since *St. Amant,* this court has elaborated on the evidentiary thresholds that a plaintiff must meet to prove actual malice in a defamation claim. The court explained in *Tavoulareas,* 817 F.2d at 788–98, that the plaintiff must show, by clear and convincing evidence, that when the defendants published the alleged defamations they were subjectively aware that it was highly probable that the story was "(1) fabricated; (2) so inherently improbable that only a reckless person would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that appellees had obvious reasons to doubt." *Id.* at 790 (internal quotations omitted). Viewing the evidence in the light most favorable to Lohrenz as the nonmoving party, *see* Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986), we hold that she failed to meet her burden.

Evidence that the publishers of the alleged defamatory statements were on a mission to reinstate the ban against women being assigned to combat positions in the military

does not suffice to show actual malice. That Donnelly and CMR acted on the basis of a biased source and incomplete information does not "demonstrate with clear and convincing evidence that the defendant[s] realized that [their] statement was false or that [they] subjectively entertained serious doubts as to the truth of [their] statement." *Bose Corp. v. Consumers' Union of U.S.*, 466 U.S. 485, 511 n.30 (1984).

Lohrenz's position — that Donnelly and CMR had to resolve doubts about the specific facts of Lt. Lohrenz's performance record once credible evidence was placed before them to cause them "obvious reasons" to doubt the reliability of the information they had previously trusted — assumes the proposition to be decided, namely whether the Navy's assertions and evidence that Lt. Lohrenz was a qualified F–14 combat pilot were credible. If the mere proffering of purportedly credible evidence that contradicts a publisher's story were enough to meet the *Tavoulareas* test, the resolution of the motion for summary judgment filed by Donnelly and CMR could have taken a different turn. As the law stands, Lohrenz's evidence must show more than "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666 (1989) (internal quotation omitted). Lohrenz's evidence also must show Donnelly's and CMR's "reckless disregard for the truth, . . . [such as] a high degree of awareness of . . . probable falsity, or . . . serious doubts as to the truth of [their] publication." *Connaughton,* 491 U.S. at 667 (internal citations omitted).

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Donnelly stated in her letter to Senator Thurmond that Lt. Lohrenz ("Pilot B") was a substandard pilot who should not be flying and who had been assigned to the F–14 program on account of a "politically driven policy." Prior to writing the letter, Donnelly had obtained information about the sole surviving woman F–14 pilot from Lt. Burns, who briefly was one of Lt. Lohrenz's training officers. Whatever bias Lt. Burns may be shown to have against women in combat flight positions, Lohrenz's evidence shows that Donnelly's publication was based on a knowledgeable, non-anonymous source. Under the circumstances, *Tavoulareas* does not require more of a publisher. 817 F.2d at 790. Additionally, by the time she published The Donnelly Report, Donnelly also had portions of Lt. Lohrenz's training records that supported Lt. Burns' assertions that the Navy made special accommodations for Lt. Lohrenz.

Although failure to investigate does not in itself establish bad faith, *see St. Amant,* 390 U.S. at 733 (citing *New York Times,* 376 U.S at 287–88), it is true, as Lohrenz contends, that once the publisher has obvious reasons to doubt the accuracy of a story, the publisher must act reasonably in dispelling those doubts. *See id.* at 731 (citing *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153 (1967)). "Thus, where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place." *Masson v. New Yorker Magazine, Inc.,* 960 F.2d 896, 901 (9th Cir. 1992) (on remand from the Supreme Court).

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Donnelly and CMR never discovered any facts sufficient to cause them to doubt their conclusion about Lt. Lohrenz's incompetence as an F–14 combat pilot. The evidence offered by Lohrenz is not comparable to the football game films available to the publisher in *Curtis Publishing* that demonstrated the falsity of the report it was relying on concerning the former football coach. 388 U.S. at 158. Even where doubt-inducing evidence could be discovered, a publisher may still opt not to seek out such evidence and may rely on an informed source, so long as there is no "obvious reason to doubt" that source. *See, e.g., McFarlane,* 74 F.2d at 1305.

In fact, the information that Donnelly and CMR received reasonably led them not to investigate allegedly contradictory evidence. By the time Donnelly published The Donnelly Report, she had additional information from the Navy that appeared to confirm much of what Lt. Burns had told her about Lt. Lohrenz. Rear Admiral Lyle Bien's report, produced in reaction to Donnelly's letter to Senator Thurmond, confirmed Lt. Burns' allegations that Lt. Lohrenz had received a number of accommodations during training and stated that some of the officers, especially junior officers, thought the accommodations were excessive. Admiral Bien's report did not confirm that Lt. Lohrenz or the other woman pilot were unqualified. He viewed concessions as a matter within the discretion of the commanding officer so long as safety and common standards were maintained, but he did confirm that there were perceptions that a double standard was being applied. Admiral Bien nonetheless concluded that gender based bias had not tainted the Navy's training or rating of women combat pilots.

Donnelly had also been told by the Vice Chief of Naval Operations, Admiral Stanley Arthur, and other Navy officers that her conclusion about Lt. Lohrenz was wrong, that her information was coming from someone "working their own agenda," and that she should be aware that she had not seen the entire training record. The following year, prior to her Army–Navy Club speech, Donnelly had again been warned by Navy officials that her conclusion about Lt. Lohrenz was inaccurate. Yet publishers need not accept " 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.' " *Connaughton,* 491 U.S. at 691 n.37 (citing *Edwards v. Nat'l Audubon Soc'y, Inc.,* 556 F.2d 113, 121 (2d Cir. 1977)). *See also Coliniatis v. Dimas,* 965 F. Supp. 511, 519 (S.D.N.Y. 1997). Unlike evidence that could be readily verified, *see, e.g., Curtis Publishing,* 388 U.S. at 158; *McFarlane,* 74 F.3d at 1299, the Navy's denials did not give Donnelly "obvious reasons" to doubt the veracity of her publication. Donnelly, for example, could reasonably infer that Admiral Bien had not been objective in concluding, despite contrary evidence in his report that detailed special accommodations made for Lt. Lohrenz, that the pilot was safe to fly and that she had not been promoted based on a double standard. Furthermore, Admiral Bien wrote that no instructor interviewed had stated that Lt. Lohrenz and Lt. Hultgreen were unsafe to fly, yet Donnelly knew that Lt. Burns had been interviewed and claimed that he had said precisely that to Admiral Bien.

Hence, despite the Navy's denials, no reasonable juror could find either that Donnelly knew her charges were false,

or that she had cause to "obviously doubt" her story. *See Sparshott v. Feld Entertainment, Inc.*, 311 F.3d 425, 429 (D.C. Cir. 2002). Although Lohrenz maintains that Donnelly and CMR should have pursued "easily available documentary or witness sources," Appellant's Br. at 42, and that it was improper for them to publish their allegations without seeing Lt. Lohrenz's full performance records, the records were not available without Lt. Lohrenz's consent, *see Lohrenz v. Donnelly*, 187 F.R.D. 1, 10 (D.D.C. 1999). Lohrenz has pointed to no authority establishing that publishers must withhold publication merely because they have not consulted particular documents, the procuring of which would effectively render the story's publication reliant on the subject's consent, and two district courts have reached a contrary conclusion. *See Secord v. Cockburn*, 747 F. Supp. 779, 788–89 & n.8 (D.D.C. 1990); *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 93 (S.D.N.Y. 1980); *see also generally St. Amant*, 390 U.S. at 731. As the district court in *Loeb* observed, the "failure to verify statements with the plaintiff and reliance upon some biased sources, in themselves, do not amount to reckless disregard of the truth." 497 F. Supp. at 93 (citing *St. Amant*, 390 U.S. at 730). Donnelly and CMR thus were not required to remain silent until the day Lt. Lohrenz agreed to disclose her confidential training records to them.

Furthermore, The Donnelly Report and CMR's press release embraced Donnelly's conclusions about Lt. Lohrenz but also reported that Navy officials held different views. Such admissions, i.e., reporting perspectives at odds with the publisher's own, "tend[ ] to rebut a claim of malice, not to establish one." *McFarlane*, 74 F.3d at 1304. Donnelly's

and CMR's dissemination of the Navy's denials of Donnelly's conclusion about Lt. Lohrenz, combined with the reasonable implication that those denials tended to demonstrate the Navy's desire to conceal double standards even after confirming that at least Donnelly's allegations of a double standard were "substantially true," weighs against, rather than for, a finding of actual malice.

For these reasons, we hold that because no reasonable juror could find by clear and convincing evidence that Donnelly or CMR acted with actual malice in any of the four publications at issue, Lohrenz failed to meet her burden of proof.

Accordingly, we affirm the judgment of the district court, granting summary judgment to Donnelly and CMR.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AUGUST 16, 2002

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 96-777
(RCL)

CAREY DUNAI LOHRENZ

Plaintiff,

v.

ELAINE DONNELLY, *et al.*

Defendants.

MEMORANDUM OPINION

Now before the Court is defendants' Motion to Strike Declaration and Report of Captain Charles Nesby, plaintiff's Memorandum of Points and Authorities in Opposition to defendants' Motion to Strike Declaration and Report of Captain Charles Nesby, defendants' Reply in Support of Motion to Strike Declaration and Report of Captain Charles Nesby, defendants' Motion for Summary Judgment and Motion for Oral Hearing, plaintiff's Opposition to defendants' Motion for Summary Judgment, defendants' Reply in Support of Motion for Summary Judgment, plaintiff's Cross-Motion for Partial Summary Judgment,

defendants' Opposition to plaintiff's Cross-Motion for Partial Summary Judgment, and plaintiff's Reply in Support of Cross-Motion for Summary Judgment. Upon consideration of the pleadings, relevant decisions of prior federal and state courts, and the record of this case, the Court will DENY defendants' Motion to Strike, GRANT defendants' Motion for Summary Judgment, DENY defendants' Motion for Oral Hearing, and DENY plaintiff's Cross-Motion for Partial Summary Judgment.

I. Background

Plaintiff Carey Dunai Lohrenz alleges that defendants Elaine Donnelly and the Center for Military Readiness (CMR) are liable for libel and slander (Count I) and for invasion of privacy (Count IV). All of these claims are governed by the law of the District of Columbia. Plaintiff Lohrenz had originally brought her case against four specified defendants: Donnelly, CMR, Copley Press, News World Communication Incorporated, and John Does 1-100. This Court granted the motion by Copley Press to dismiss the complaint for lack of jurisdiction, and defendant News World Communication has settled with plaintiff. Defendants Donnelly and CMR now move for summary judgment, and plaintiff Lohrenz has filed a cross-motion for partial summary judgment.

Defendant Donnelly is the President and primary spokesperson of defendant CMR, a public policy organization concerned with military personnel issues. CMR was incorporated in Michigan in 1992. Plaintiff alleges that CMR is supported by a small group of retired military officers named as defendants John Does 1-100.

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Plaintiff Lohrenz was sworn into the Navy as an officer candidate in November 1990; after training, she received her commission in May 1991. In 1993, plaintiff Lohrenz received her designation as a naval aviator; shortly thereafter, plaintiff was assigned to the F-14 Tomcat. In July 1993, plaintiff reported to the Fleet Replacement Squadron (FRS) VF 124, based at Miramar Naval Air Station, for F-14 training. Plaintiff was one of two women assigned to VF 124 for F-14 training; the other was the late Lt. Kara Hultgreen. Plaintiff received approximately eleven months of instruction in piloting the F-14 and in August 1994, plaintiff joined fighter squadron 213, then attached to the U.S.S. Abraham Lincoln in the Pacific Fleet.

Throughout her training at Miramar and when she was a member of fighter squadron 213, plaintiff was evaluated for her performance and fitness as an F-14 pilot. Lohrenz asserts that her evaluations show that she was an average to above-average F-14 pilot; defendants assert that Lohrenz's evaluation record shows that she was a sub-standard pilot who often received benefits and training that her male counterparts did not receive. The training records will be discussed at more length *infra* sections III and IV.

On October 25, 1994, Lt. Hultgreen was killed while landing an F-14 on the U.S.S. Abraham Lincoln. This tragic event signaled the beginning of a series of events which led to the instant lawsuit. After the death of Lt. Hultgreen, there was a barrage of media articles about the wisdom of the military's recent decision to allow women in combat; many commentators were critical of the military's decision.

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In mid-December of 1994, defendant Donnelly spoke on the telephone with and received a letter from a Lt. Patrick Jerome "Pipper" Burns asserting that both Hultgreen and plaintiff had been promoted because of political pressure to incorporate more women into the Navy, and that neither was a qualified pilot. On January 6, 1995, defendant Donnelly met with Adm. Stanley Arthur who was one officer responsible for the training of F-14 pilots; at that meeting, she informed Arthur of her belief that Hultgreen and plaintiff had been carrier-qualified as F-14 pilots only because they were women, and that both should actually have failed out of the program. Admiral Arthur promised to investigate her suspicions, but he neither confirmed nor denied the facts in defendant Donnelly's possession. On January 16, 1995, defendant Donnelly sent a letter to Senator Strom Thurmond (hereinafter the "Thurmond letter"), repeating and describing the facts and allegations made in the letter from Lt. Burns. Defendant Donnelly asserted that both Lt. Hultgreen and plaintiff Lohrenz were unqualified to be fighter pilots, and had received their positions as a result of political pressure. In the Thurmond letter, plaintiff Lohrenz was not identified by name; she was referred to only as "Pilot B" in a purported effort to protect her identity. It was, however, well known that there were only two women carrierqualified as F-14 pilots, so plaintiff's identity as "Pilot B" was no mystery to other naval aviators, other officers and crew aboard the U.S.S. Abraham Lincoln, and any other *individuals* who were familiar with the naval aviation community. In addition, plaintiff Lohrenz's actual identity as "Pilot B" was subsequently revealed by various newspapers. *See* Defs. Mot. for Summary Judgment, Exh. 11 to Lohrenz Dep. (San Diego *UnionTribune* article); *id.*, Exh. 14 to Lohrenz Dep. *(Washington Times* article).

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Sometime between October 28, 1994 and April 1995, the FRS training records of Hultgreen and plaintiff were removed from confidential Navy files by fellow officers who served with them at VF 124 or at fighter squadron 213.[1] Portions of those records were transmitted to defendant Donnelly by Lt. Burns. Defendant Donnelly had two further meetings with Adm. Arthur (on Febraury 8 and March 24, 1995), one telephone conversation with Adm. Arthur (March 6, 1995), one meeting with Adm. Mike Boorda (on March 6, 1995), who was also involved with the F-14 training program, and one conversation with Commander Thomas Sobieck (date unknown), the commanding officer of the FRS. During those conversations, Arthur, Boorda and Sobieck discussed defendant Donnelly's research and information with her; all three believed that defendant Donnelly was incorrect in her conclusions, and they communicated this to her. At the March 24, 1995 meeting with Adm. Arthur, defendant Donnelly was shown a copy of a Report authored by Rear Adm. Lyle G. Bien, which had been prepared in response to the allegations made by Donnelly in her March 6 meeting with Arthur. That report confirmed many of the facts then known to defendant Donnelly, but concluded that Hultgreen and plaintiff had been promoted according to the usual Navy standards.

On April 25, 1995, defendants Donnelly and CMR published a Special Report entitled "Double Standards in Naval Aviation" (hereinafter "the Donnelly Report"). *See* Pl. Cross-Mot. for Summary Judgment, Exh. 17 (Donnelly Report). The Donnelly Report republished the letter sent to Senator Thurmond and included additional

1. One officer, Lt. Patrick Burns has admitted his involvement. Plaintiff alleges that other unknown officers were involved.

excerpts from plaintiff's training records and comments from letters from male aviators criticizing plaintiff Lohrenz and Lt. Hultgreen. The allegations in the Donnelly Report were that female and male naval aviators were treated differently because female aviators were promoted on a lower standard, that female aviators received special concessions, that people who criticized the Navy's policy of incorporating women into combat positions were unfairly attacked, and that plaintiff was one pilot who received special treatment which permitted her to advance. In the Donnelly Report, plaintiff Lohrenz was referred to only as "Pilot B," but her training records–with particular dates, locations, and scores–were reported.

Copies of the Donnelly Report were circulated on the U.S.S. Lincoln and among the naval aviation community at large, the general public, and the national news media. After the publication and circulation of the Report, plaintiff Donnelly was contacted by Commander Thomas Sobieck, commander of VF 124 where plaintiff and Hultgreen received their F-14 training. Sobieck told Donnelly that he believed her report to be false and misleading, and he urged her to withdraw the report because of its falsity and because he believed that the report would be harmful to the continued training of plaintiff as an F-14 pilot. Defendant Donnelly declined, and continued to promote the Report and its findings through various media sources. In addition to various press releases by defendants, on March 28, 1996, defendant Donnelly gave a speech at the ArmyNavy Club in Washington, D.C., essentially repeating the findings of the Report and again referring to plaintiff only as "Pilot B."

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After the publication of the Donnelly Report, plaintiff alleges that her performance declined, and her commanders became overly critical. Plaintiff was eventually removed from flight status on May 30, 1995. She then appeared before a Field Naval Aviation Evaluation Board (FNAEB). An FNAEB may be convened to evaluate the performance, potential, and motivation of a particular serviceperson for a particular assignment. The FNAEB considered the evidence against plaintiff and concluded that she should retain flight status but be assigned to fly in a different aircraft. Plaintiff was not, in fact, returned to flight status at that time because her commanding officer, Adm. Yakely, recommended that she be removed from flight status entirely.

On February 10, 1997, the Navy Inspector General released a report (hereinafter "the Inspector General Report") which is the subject of extreme disagreement between the parties. The Inspector General Report reviewed allegations by plaintiff and her parents against the FNAEB Report, and concluded that one of their allegations was substantiated.

In the fall of 1997, the Navy decided to remove Lt. Burns' name from the promotion list because he had admitted to sending defendants copies of plaintiff's training records and had spoken out against the Navy's carrier-qualification of Lt. Hultgreen and plaintiff. In November of 1997, defendants issued a press release entitled, "Navy Faces Crucial Choice: Principle or Public Relations?" which criticized the Navy for disciplining Burns. In that press release, defendants repeated their allegations that plaintiff was not a qualified pilot and had benefitted from preferential treatment.

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Plaintiff asserts that defendants were aware of, recklessly disregarded, or were negligent about the possibility that the allegations against plaintiff were, in fact, false. Defendant Donnelly never reviewed a complete copy of plaintiff's training records, and from January to May of 1995, defendant Donnelly spoke with various Navy officers who disputed the conclusions that defendant Donnelly had drawn about the training of female pilots. After the publication of the Donnelly Report, plaintiff alleges that defendants were informed that the allegations were false, and defendants refused to retract the Donnelly Report and continued to publicize their allegations. Plaintiff further asserts that in the Donnelly Report, plaintiff's training records were selectively edited and mislabeled to create the impression that plaintiff was not a qualified pilot. Defendant Donnelly asserts that she was not aware, did not recklessly disregard, and was not negligent about the possibility that the allegations might be false; in fact, defendant continues to assert that the allegations about plaintiff are true.

Plaintiff asserts that as a result of the actions of defendants Donnelly and CMR, plaintiff has suffered great embarrassment and humiliation, irreparable injury to reputation and good standing in the naval aviation community, economic losses, and loss of her career as both a naval aviator and any opportunity for a career in civil aviation.

II. Motions to Strike

The parties have filed various motions to strike materials submitted in opposition to their motions. In ruling upon these

motions to strike, the Court notes that both parties appear to be engaged in fairly transparent attempts to use motions to strike in order to control the merits of the case. A motion to strike is not an appropriate vehicle through which to contest the credibility of a witness or to draw further attention to the fact that one piece of evidence is contradicted by another.

A. Defendants' Motion to Strike the Declaration and Report of Captain Charles Nesby

Defendants move to strike the Declaration and Report of Captain Charles Nesby, included as Exhibit 1 to plaintiff's Cross-Motion for Partial Summary Judgment and Opposition to Defendants' Motion for Summary Judgment.[2] Plaintiff seeks to designate Nesby as an expert in F-14 training and piloting, and represents that Nesby will testify about plaintiff's training records and evaluations, his own personal observations of plaintiff's performance, the validity of the evaluations by other pilots, general and specific principles of pilot training and F-14 pilot training, and other issues related to F-14 pilot training and evaluation such as terminology, common practices, and standards. *See* Pl. Designation of Expert Witnesses, filed August 12, 1999, at 8-11. In his Declaration, Report, and Supplemental Report, Nesby details his qualifications as an expert witness in piloting F-14s and training F-14 pilots. Nesby entered flight school in 1974 and was designated a naval aviator in

2. Defendants have filed a motion to strike the Nesby Declaration, but give further reasons for their motion to strike in their Reply in Support of Motion for Summary Judgment. The Court will address all the arguments given by defendants with respect to the Nesby Declaration in this section.

1975. In 1977, Nesby was trained to fly the F-14; in 1981, Nesby became an F-14 flight instructor. Nesby trained F-14 pilots for three years, was in charge of developing and writing the manual for operating and piloting the F-14, and received several levels of qualification to train new pilots. Captain Nesby ascended through various ranks, and has now been appointed the Director of the Center for Minority Veterans in the Department of Veterans Affairs. In short, it appears that Captain Nesby is intimately familiar with flying the F-14 and training F-14 pilots. His opinions that he now asserts are based on

> my own personal observations of LT Lohrenz when she went through Advanced Jet Training course at NAS Kingsville while I was Commander of Training Air Wing TWO, my own background and experience as an F-14 pilot, my experience as an instructor in the F-14 Fleet Replacement Squadron, the objective facts disclosed by the Navy's records pertaining to LT Lohrenz training, the reports and evaluations of the naval officers who conducted her FRS training at VF 124, and the several reports of Navy and Department of Defense investigations into Ms. Donnelly's allegations against LT Lohrenz and the Navy personnel responsible for her training in the F-14 Fleet Replacement Squadron.

Pl. Opp., Exh. 1 (Nesby Decl.) at 13. Based on those materials and experiences, Nesby avers that plaintiff was a qualified pilot and that the practices for which defendants' report find fault were actually quite common among F-14 pilots of experience comparable to plaintiff's.

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Defendants move to strike Nesby's Declaration on several grounds: (1) because the declaration does not comply with Federal Rule of Civil Procedure 26(a)(2)(B); (2) because Nesby is incompetent to render opinions under Federal Rule of Evidence 702, which governs testimony by experts; and (3) because Nesby's instant Declaration is contradicted by testimony that he gave before the Navy Inspector General and other evidence now before the Court.

1. Plaintiff's Failure to Comply with Federal Rule of Civil Procedure 26(a)(2)(B)

Federal Rule 26(a)(2)(B) provides a party submitting expert testimony must provide:

> a written report prepared and signed by the witness, a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26 (a)(2)(B). It appears plain that plaintiffs have not complied with this rule. Plaintiffs have failed completely to disclose a list of all publications authored by

Nesby, the compensation paid to Nesby, and a listing of any other cases in which Nesby has testified or been deposed. Plaintiff's only explanations of the failure to provide this information are that defendant should have complained about this earlier, that defendant failed to provide similar information, and that plaintiff is in the process of compiling this information. The first two explanations are meritless–finger-pointing by the parties misunderstands the purpose of the rule mandating these disclosures. *See Nguyen v. IBP, Inc.*, 162 F.R.D. 675 (D. Kan. 1995) ("The 1993 amendments to the Federal Rules of Civil Procedure which instituted the disclosure requirement were an attempt to assure that all parties disclosed certain information concerning their expert witnesses, including certain background facts which would enable a party to prepare for cross-examination at deposition or trial").

Despite plaintiff's failure to comply with Rule 26, the failure to comply with the disclosure rule will not result in that expert's testimony being stricken unless the failure was prejudicial to the party entitled to the disclosure. *See id.* Defendants do not aver that any prejudice resulted from the plaintiff's failure to make the required disclosures. Accordingly, the motion to strike will not be granted for plaintiff's failure to comply with the terms of Rule 26(a)(2)(B).

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2. Defendants' Objection that Nesby Is Not Qualified as an Expert

Defendants second objection is that Nesby's declaration is incompetent and inadmissible pursuant to Federal Rule of Evidence 702, which provides as follows:

> If scientific, technical, or other *specialized* knowledge will assist the trier of fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The Court must ensure that the testimony of the proffered expert testimony is both relevant and reliable. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

Defendants first assert that Captain Nesby is unqualified to render the opinions included in his Declaration and attached letter, and that his Declaration should therefore be stricken. They assert that Captain Nesby did not observe plaintiff when she trained at NAS Miramar or while she served in Fighter Squadron 213 aboard the Abraham Lincoln, and that Captain Nesby has not published anything about F-14 training, has never testified anywhere, and is not paid. Contrary to defendants' assertions, it is not necessary for Nesby to have had any contact with plaintiff; it is quite

ordinary and, in fact, expected for an expert witness of this type not to have had long-term, prolonged interaction with a party. Defendants' assertions that Nesby is not published (although apparently Nesby is in the process of compiling a list of publications for the parties), has not testified, and is not being paid are similarly unconvincing; these are not prohibitions on Captain Nesby's status as an expert witness, particularly in his asserted area of expertise–piloting F-14s and training F-14 pilots–because it is certain that this area would require intense practical experience, and F-14 pilots are probably not frequently called to testify about their expertise. According to the uncontested statements in his Declaration, Captain Nesby has had a long history of piloting the F-14 and of training and evaluating other F14 pilots. It appears that he is intimately familiar with the method and practice of evaluating F-14 pilots, and what may be reasonably expected from an officer who seeks to become an F-14 pilot. This is an area of fact where technical expertise dominates and where the Court and jurors would likely be inexperienced; Captain Nesby would likely be able to "assist the trier of fact." Fed. R. Evid. 702.

Defendants next seek to have the Nesby declaration stricken from the record because they believe that the plaintiff has submitted the declaration to prove malice, which would be a required element of liability for Counts I and IV if plaintiff were to be found a limited-purpose public figure. Defendants argue that Nesby is not an expert in libel or slander, and therefore may not render any opinion on actual malice. Defendants are correct in asserting that courts have generally disfavored expert testimony in determining actual malice, which is essentially a determination of defendants'

subjective state of mind. *See Tilton v. Capital Cities/ABC Inc.*, 938 F. Supp. 751, 753 (N.D. Okla. 1995); *World Boxing Council v. Cosell*, 715 F. Supp. 1259 (S.D.N.Y. 1989). It is true that there are some statements in Nesby Declaration and attachments that could be construed to imply malice by defendants. For example, Nesby asserts that "Donnelly was careful to protect the identity of her informant, which persuades me that she knew when she asked the officer to provide her with copies of the training records that she was encouraging him to violate federal law." Pl. Cross-Mot. for Summary Judgment, Exh. 1 (Nesby Decl.), Att.2 at 2. Further, Nesby avers that

> [t]he selective use of a few records, the misrepresentations of the meaning of the records she did use, and the magnitude of the deception dictates only one conclusion–that Elaine Donnelly and the people who helped her intended to deceive the Senate Armed Services Committee, LT Lohrenz' superiors in her chain of command, and, after release of the CMR report, LT Lohrenz' fellow officers and the general public.

Id., Exh. 1 (Nesby Decl.), Att. 2 at 2. It is clear that the plaintiff may not establish malice, a subjective state of mind, solely through expert testimony, and that an expert in piloting F-14s and training F-14 pilots may not render legal opinions concerning defendants' alleged malicious or deceptive motives. The Court will therefore not consider any statements made by Captain Nesby to render any expert opinion as to whether defendants acted maliciously or deceptively; this limitation on the Court's construction and interpretation of

Captain Nesby's Declaration, however, still falls far short of supporting the notion that Captain Nesby's Declaration should be stricken from the record.

Defendants also assert that Captain Nesby's Declaration cannot be used to support any possible conclusions about damages; that is, Captain Nesby asserts that but for Donnelly's statements and the CMR Report, plaintiff would be a pilot in civil commercial aviation or would be "flying missions over Afghanistan today." *Id.*, Exh. 1 (Nesby Decl.), Att. 2 at 2. Captain Nesby further opines that "the false allegations concerning the content of Lohrenz' FRS training records made and publicized by Elaine Donnelly created unusually [sic] stresses on LT Lohrenz which ultimately caused her to lose her career as a combat pilot." *Id.*, Exh. 1 (Nesby Decl.), Att. 2 at 13. According to the qualifications listed in his Declaration, Nesby is not qualified to render opinions about the standards of piloting in civil commercial aviation, nor does he have a true basis upon which to draw a connection between the stress plaintiff felt as a result of the CMR report and her ultimate termination. Again, though the Court does not consider Nesby an expert in civil commercial aviation or in psychology and will not construe any statements in his Declaration which might support any possible calculation about damages, defendants do not contest his expertise in piloting F-14s and training F-14 pilots, and his Declaration therefore shall not be stricken from the record.

Defendants' last assertion with respect to Nesby's qualification as an expert and his ability to render opinions is that Nesby relies on hearsay and other forms of inadmissible evidence. Experts are entitled to rely on

inadmissible forms of evidence, as long as the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. Therefore, Nesby is entitled to rely on hearsay and other forms of inadmissible evidence, if those inadmissible forms of evidence would normally be relied upon by others with expertise in the area of flying F-14s and training F-14 pilots.

3. Defendants' Objection that Nesby's Declaration and Opinions Contained Therein Are Contradicted by Other Evidence

Defendants assert that Capt. Nesby gave contradictory testimony before the Navy Inspector General, *see* Defs. Reply in Support of Mot. for Summary Judgment, Exh. 5 to Donnelly Suppl. Aff., and that his Declaration in this case is contradicted by the FNAEB Report, see Defs. Mot. for Summary Judgment, Exh. 9 to Donnelly Aff., and by the Navy Inspector General Report, id., Exh. 10 to Donnelly Aff. Mere inconsistency and contradiction is insufficient to support a motion to strike a document from the record, particularly where, as here, the document that defendants seek to strike is a sworn Declaration signed under penalty of perjury.

In sum, the Court finds that defendants have failed to proffer sufficient reasons that the Declaration of Captain Nesby should be stricken from the record of this case, and the Court therefore DENIES the motion to strike.

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B. Plaintiff's Motion to Strike the Field Naval Aviators Evaluation Board (FNAEB) Report

In her opposition to the defendants' Motion for Summary Judgment, plaintiff moves to strike the FNAEB Report which was proffered by defendants as exhibit 5 to the Affidavit of Lt. Burns and as exhibit 9 to the Affidavit of Elaine Donnelly. *See* Pl. Opp. to Defs. Mot. for Summary Judgment at 60-61. Plaintiff asserts that the FNAEB Report was unreliable hearsay, the product of "unlawful command influence,"and was subsequently invalidated by the Department of the Navy. Plaintiff asserts that the FNAEB Record is not an admissible business record because there has been no witness or affidavit to aver that the FNAEB Record meets the requirements of that exception to the hearsay rule. Defendant counters that the FNAEB Report is admissible under Federal Rule of Evidence 803(8) as a public record.

It is clear that the FNAEB Record would normally be considered admissible pursuant to Rule 803(8) because records of government agencies are normally found admissible under that provision. *See, e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153 (1988); *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108 (4th Cir. 1993). The Record may, however, be inadmissible if the plaintiff can show that it is not trustworthy. Factors that may be used to determine the trustworthiness of the report are: "(1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivational problems." *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir. 1984). "Other factors may indicate a lack of trustworthiness: unreliability, inadequate investigation,

inadequate foundation for conclusions, invasion of the jury's province." *Distaff, Inc.*, 984 F.2d at 111. If a record is found to be admissible under Rule 803(8), no foundational testimony is required. *See United States v. Doyle,* 130 F.3d 523, 546 (2d Cir. 1997).

The first relevant factor in this instance is timeliness. The investigation was timely; it was submitted on May 30, 1995, which is exactly during the time period when the primary events leading to this lawsuit transpired. The second relevant factor is the special skill or experience of the officials. The officials who completed the FNAEB Report were Lt. Cmdr. Warren S. Ryder, Lt. Cmdr. John Fristachi, Lt. Robert Roberts, Lt. Brenda Scheufele, and Lt. Sharon Miller; neither party contests the skills or experience of the officials.[3]

The third relevant factor is "possible motivational problems." Plaintiff has more fertile ground to plough here; the FNAEB Report and recommendations were criticized by a subsequent report by the Navy Inspector General, *see* Defs. Mot. for Summary Judgment, Exh. 6 of Burns Dep. (Inspector Gen. Rept.) ¶¶ 415-44. The Navy Inspector General concluded that an allegation that the FNAEB Report was tainted by "inconsistencies, inaccuracies and emotionalism" was "substantiated." *See id.*, Exh. 6 of Burns Dep. (Inspector Gen. Rept.) ¶¶ 415-44. Further, plaintiff proffers the statement of Cmdr. F.J. Kilian, the commanding officer who

3. Plaintiff Lohrenz specifically stated at the time that the FNAEB was convened that she did not object to the membership of the Board. See Defs. Mot. for Summary Judgment, Exh. 5 of Burns Dep. at 5.

convened the FNAEB and ultimately approved its findings and recommendations. Kilian asserts that he did not properly review the plaintiff's training records, that had he reviewed the training records he would not have agreed with the conclusions of the FNAEB, that he was influenced by his authorities to approve the report, and that he now wishes to repudiate his approval of the FNAEB Report.[4] *See* Pl. Cross-Mot. for Summary Judgment, Exh. 2 (Kilian Decl.). Although the Court certainly notes that both the Navy Inspector General and the officer who approved the FNAEB have both criticized the FNAEB Report, these concerns appear to ultimately drive more at the weight the FNAEB Report should be accorded, not its admissibility. The fact that the parties so hotly dispute the credibility of their various sources, and are adept at pointing out the inconsistencies between various reports and witnesses, further inclines the Court to admit the FNAEB Report and the Nesby Declaration. Accordingly, plaintiff's motion to strike the FNAEB Report is DENIED.

C. Defendants' Motion to Strike the Declaration of Frederick J. Kilian

Defendants move to strike the Declaration of Frederick J. Kilian, proffered as exhibit 2 to plaintiff's Opposition to defendants' Motion for Summary Judgment and discussed briefly *supra* § II.B, asserting that the declaration is "rife" with inadmissible hearsay and is contradicted by other documents and evidence, including his own prior sworn

4. Defendants have moved to strike the Kilian Declataion, asserting that it is actually untrustworthy, perjurious, and includes facts and conclusions that are blatantly impossible; defendants' motion to strike the Kilian Declaration is discussed *infra* § II.C.

statement. Defendants point to one statement which they allege is inadmissible hearsay; Kilian avers that his commanding officer "made it clear" to him that Kilian should give plaintiff the opportunity to discontinue her aviation career. Although the Court recognizes that there may be hearsay contained within a single paragraph in a seven-page Declaration, this is insufficient for the Court to find that the declaration should be entirely stricken from the record. *Cf. Quality Inns Int'l, Inc. v. Tampa Motel Assoc., Ltd.*, 154 F.R.D. 283, 288 (M.D. Fla. 1994) ("Motions to strike are generally viewed with disfavor and are infrequently granted.").

Defendant further asserts that the Kilian Declaration should be stricken because it contradicts testimony that he gave to the Navy Inspector General, see Defs. Mot for Summary Judgment, Exh. 12 to Donnelly Aff., and contradicts other Navy documents and records. Mere inconsistency and contradiction is insufficient to support a motion to strike a document from the record, particularly where, as here, the document that defendants seek to strike is a sworn Declaration signed under penalty of perjury. Accordingly, defendants' Motion to Strike the Declaration of Frederick J. Kilian is DENIED.

III. Defendants' Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment

Defendants Donnelly and CMR have moved for summary judgment on Count I, libel and slander, and Count IV, invasion of privacy. Plaintiff has filed a cross-motion for partial summary judgment for (1) an order finding that

plaintiff was a private individual and not a public figure; or, alternatively (2) an order finding that defendants did act with "actual malice" when they published the allegedly defamatory statements about plaintiff Lohrenz.

Plaintiff's Count I for libel and slander includes two distinct but related torts; both fall under the umbrella category of "defamation." In order to prevail on a claim of libel in the District of Columbia, a plaintiff must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Klayman v. Segal,* 783 A.2d 607 (D.C. 2001). In order to prevail on a claim of slander in the District of Columbia, a plaintiff must show that the defendant made an oral statement that was false and defamatory which tends to injure the plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community. *Smith v. District of Columbia,* 399 A.2d 213 (D.C. 1979).

Both parties now seek summary judgment on the standard of fault to which defendants may be held in actions for libel and slander. Defendants assert that plaintiff is a limited-purpose public figure, and the standard of fault is therefore governed by *New York Times v. Sullivan,* 376 U.S. 254 (1964), which requires plaintiff show that defendants acted with "actual malice" in publishing the allegedly defamatory statements. Plaintiff has made a cross-motion for summary

judgment for an order finding that plaintiff was a private individual, and that the standard of fault that plaintiff must prove is merely negligence. Because the factual and legal issues at the heart of these motions for summary judgment on the issue of whether plaintiff was a "private individual" or a "public figure" are closely intertwined, the Court will address the motions together.

If the Court does find that plaintiff was a public figure, defendants assert that plaintiff will be unable to show "actual malice," and that defendants are therefore entitled to summary judgment on Counts I and IV. Plaintiff moves for an Order finding that defendants did, in fact, act with "actual malice."

In the alternative, defendants have asserted two additional defenses: (1) that the statements alleged to be "false and defamatory" were actually "substantially true," and defendant may therefore not be held liable for the statements; or, alternatively (2) that defendants' statements were protected by the "Fair Reporting" doctrine that is recognized in the District of Columbia. These arguments will be discussed infra section III.B.4.

Defendants' motion for summary judgment on Count IV, invasion of privacy, is governed by a distinct but related body of law. Although there are significant differences between an action for defamation, which compensates the plaintiff for damage to reputation, and invasion of privacy, which compensates the plaintiff for the mental distress associated with exposing private matters to public view, the heart of both torts is the harm that a plaintiff suffers from others being

informed of a fact which was actually false and defamatory. In order to prevail on a claim of invasion of privacy for false light, a plaintiff must show: (1) publicity (2) about a false statement, representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be highly offensive to a reasonable person. *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999). Because the Supreme Court has held that *New York Times v. Sullivan*, 376 U.S. 254 (1964), does apply to actions for invasion of privacy, *Time Inc. v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), if defendant is a media defendant (as is conceded by both parties here) and plaintiff is a public figure (discussed infra § III.A), then plaintiff must show that the defendant committed the tort of invasion of privacy with "actual malice." The determination of whether plaintiff is a public figure is, therefore, highly relevant to both Counts I and IV.

Summary judgment is appropriate in those cases where there is no genuine dispute as to any material fact, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the Court must view all evidence in the light most favorable to the non-moving party, but the non-moving party must proffer proper evidence to support any material factual assertions. *See Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("[A] plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment . . .").

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A. Limited-Purpose Public Figure Doctrine

Both parties agree that plaintiff Lohrenz was neither an "all purpose" public figure nor a public official. Defendants assert, however, that plaintiff Lohrenz was a "limited purpose" public figure, and that she must therefore prove that defendants acted with "actual malice" in publishing a defamatory falsehood. Plaintiff asserts that she is a private figure, that she was unwillingly thrust into the media spotlight, and that defendants may therefore be held liable if they negligently published defamatory falsehoods about her. The question of whether plaintiff was a private individual or a limited purpose public figure is a question of law for the Court to resolve. *See Tavoulareas v. Piro,* 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc).

The Supreme Court has held that a media defendant may not be liable for defamation unless the plaintiff is able to prove that the defendant published a defamatory falsehood with "actual malice"; that is, the defendant must have published the defamatory falsehood with knowledge that it was false or with reckless disregard of its veracity. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Media defendants are, however, only entitled to the protection of this heightened standard when the defamatory statement was published about a public official or a public figure; if the defamatory falsehood had been published about a private individual, then privacy rights trumped First Amendment freedom, and state law would govern any action for the defamation. *See id.* The Court reasoned that there was a First Amendment right to criticize public officials and public figures, and any less restrictive legal standard would cause the media to self-censor for fear

of legal liability for false statements. Further, the Court noted that public figures would have access to media outlets to correct any misstatements.

The Court subsequently extended the application of *New York Times* to cover defamatory falsehoods against plaintiffs who, although private individuals, had voluntarily or involuntarily become involved in an issue of general or public interest. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("[I]t may be possible for someone to become a public figure through no purposeful action of his own . . ."); *Rosenbloom v. Metromedia Incorporated*, 403 U.S. 29 (1971) ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily choose to become involved."). In determining whether a private individual has become a "limited purpose public figure," the Court should examine the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352.

As discussed briefly above, the reach of *New York Times* and its progeny has been further extended to invasion of privacy claims by public figures. *Time Inc. v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). Therefore, the same analysis by which the Court determines whether plaintiff is a private or limited-purpose public figure will determine the standard of fault in both Count I and Count IV.

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In the instant case, the parties agree on the general facts underlying the dispute about whether plaintiff Lohrenz was a private individual or a limited-purpose public figure. First, the parties agree that in general, plaintiff Lohrenz did not actively seek out the attention of the media. Nonetheless, plaintiff Lohrenz did attract the attention of the media because of the fact that she was one of the first women assigned to pilot the F-14 Tomcat. On May 23, 1993, an article about plaintiff Lohrenz appeared in the Green Bay *Press Gazette* publicizing the fact that plaintiff was potentially the first female Training Command graduate to receive orders to move directly into a combat designation. See Defs. Mot. for Summary Judgment, Exh. 1 to Lohrenz Dep. In that article, which included a picture of plaintiff and was entitled "Skills propel woman pilot," plaintiff was quoted as saying, "A plane doesn't know if a man or a woman is flying it. It's the person who's flying it and that person's ability that counts." On September 7, 1993, an article appeared in the Milwaukee *Journal,* entitled "Pilot May Be First to Break a Navy Gender Barrier." *Id.*, Exh. 2 to Lohrenz Dep. Plaintiff Lohrenz was quoted as saying, "I don't get any preferential treatment because I'm a woman, and the guys in my squadron treat me as an equal." One year later, an article entitled "The Jet Doesn't Know the Difference" ran in *The Compass,* which is distributed primarily within the naval aviation community. Pictures and quotes from plaintiff Lohrenz and Lt. Hultgreen figured prominently in that article. *Id.*, Exh. 4 to Lohrenz Dep. Lohrenz discussed her reactions when she was told that the policy against women in combat had changed: "I was in tears, . . . I couldn't believe all the guys I had gone through flight school with, and had worked so hard and competed with and done well, were going to go out to

the fleet and get a chance and I wasn't going to have my chance. And on that Wednesday the Defense Secretary came out and said off the books goes this law, we're going to allow women in aviation combat." *Id.*, Exh. 4 to Lohrenz Dep. On September 9, 1994, a second article appeared in *The Compass,* entitled "Blacklions fly into naval aviation history," which featured the name and photograph of plaintiff. Plaintiff Lohrenz was quoted as saying, "I'm relieved to have made it. But I know that there's a big challenge ahead. A lot of eyes are going to be on me, and I'll have to prove myself just like any other new guy in the squadron." *Id.*, Exh. 5 to Lohrenz Dep. Plaintiff was further quoted as saying, "I think we've opened some doors, and the more exposure we get the more people can see that women can do this." Id., Exh. 5 to Lohrenz Dep. On October 14, 1994, the Mountain Lake *Observer Advocate* published an article entitled, "Carey Lohrenz makes history, joins Navy Fighter Squadron," which included many of the quotes already cited. *Id.*, Exh. 6 to Lohrenz Dep. On October 22, 1994, the Green Bay *News-Chronicle* published an article entitled, "Green Bay woman makes history," which included many of the quotes already cited. *Id.*, Exh. 7 to Lohrenz Dep. Plaintiff Lohrenz's face was even used on a Navy recruiting poster.

After the death of Lt. Hultgreen, the media scrutiny of the issues surrounding women in the military intensified; newspaper articles and television and radio programs covered the intensifying debate over whether women were being promoted too quickly for political purposes and whether, specifically, women were suited for intense, dangerous jobs like piloting F-14s. Media reports about the issue of women and the military appeared in the

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San Diego *Union-Tribune*, a local San Diego news program on KNSD-News, the *New York Times*, the *Navy Times*, CBS Morning News, the Chicago *Tribune*, the *Air Force Times*, Nightline, *USA Today*, the *Detroit News*, and the Los Angeles *Times*. *See* Defs. Mot. for Summary Judgment, Exhs. 8-35.

The Court of Appeals for this Circuit has previously addressed the distinction between "private individuals" and "limited-purpose public figures," holding that "a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). The *Waldbaum* court set out a three-part test to determine whether an individual may be categorized as a "limited purpose public figure." The court must first isolate the public controversy; the controversy must be "a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Id.* at 1296. In the instant case, it is clear that there was a public controversy both before and after the death of Lt. Hultgreen. The public controversy concerned the role of women in the military and whether women should be allowed in combat; after the death of Lt. Hultgreen, the media coverage was extended to include a debate over whether the military, in its haste to incorporate women into its ranks, promoted certain women too quickly and under more lax standards. It is clear to the Court that both before and after the death of Lt. Hultgreen, there was a "public dispute" that had "foreseeable and substantial ramifications for persons beyond its immediate participants."

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The second step of the *Waldbaum* analysis is an examination of the plaintiff's role in the controversy; "trivial or tangential participation" will not suffice to thrust a plaintiff into the role of a "public figure." Id. at 1297. In analyzing the plaintiff's participation, the court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to plaintiff's conduct and statements. In this case, plaintiff's past conduct certainly supports a finding that she was a limited-purpose public figure. Plaintiff was one of two women to have qualified for one of the most dangerous combat positions in naval aviation. Plaintiff gave numerous statements to the media and appeared on television shows both before and after the death of Lt. Hultgreen commenting about her position and the fact that she was a forerunner in the military's attempt to integrate women into combat positions.

Plaintiff asserts that despite these numerous incidents of media coverage, she did not "thrust" herself in the media spotlight, and the *New York Times* standard therefore does not apply. Contrary to plaintiff's argument, it is well-settled that private individuals may become limited-purpose public figures unwillingly without voluntarily thrusting themselves into the public eye. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985) (holding that air traffic controller involuntarily became a limited-purpose public figure after intense media coverage of an airplane accident while he was on duty). Moreover, plaintiff voluntarily gave statements about her assignment as an F-14 pilot and about her status as one of the first female F-14 pilots, and she was well-aware that her position as one of the first female F-14 pilots would attract public attention. *See Clyburn v. News*

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World Comm., Inc., 903 F.2d 29, 33 (D.C. Cir. 1990) (holding that plaintiff was a limited-purpose public figure because his contracts with the District of Columbia government and his propensity for "hobnobbing" with government officials raised the chances that the public would become interested in his affairs).

The extent of the press coverage also inclines this Court to hold that plaintiff was a limited-purpose public figure. The debate about the role of women in the military, and plaintiff Lohrenz in particular, received both local and national media attention. Plaintiff Lohrenz was named, quoted, and pictured in print and television media outlets. Lastly, there was a definite public reaction to plaintiff's conduct and statements. Although the level of opposition to plaintiff's position as an F-14 pilot rose significantly after the death of Lt. Hultgreen, it is clear that from the outset, before the death of Lt. Hultgreen, there was substantial public interest in plaintiff's assignment to the F-14.

In sum, the second prong of the *Waldbaum* analysis supports a finding that plaintiff Lohrenz is a limited-purpose public figure; plaintiff was a central figure in the public controversy over the place of women in the military, and she was featured prominently in much of the media coverage about that issue.

In the third prong of the *Waldbaum* analysis, the Court must determine whether the "alleged defamation must have been germane to the plaintiff's participation in the controversy." *Waldbaum*, 627 F.2d at 1298. It is clear in this instance that the alleged defamation was germane to the

plaintiff's participation in the controversy; defendants allegedly defamed plaintiff Lohrenz by asserting that she was an unqualified pilot and had been promoted because she was a woman, and plaintiff's participation in the controversy included statements that she was as well-trained as the male pilots and had been promoted under the same standards applied to the male pilots.

In her opposition to defendants' motion for summary judgment and in her cross-motion for summary judgment, plaintiff asserts that she is not a limited-purpose public figure because her "name and likeness" were not used frequently; her argument is based on *Dameron v. Washington Magazine, Incorporated,* 779 F.2d 736 (D.C. Cir. 1985), where the D.C. Circuit Court of Appeals held that an air traffic controller who was on duty during an airplane crash was a "limited purpose" public figure, albeit involuntarily, for the purposes of the public controversy about whether there were errors in air traffic control procedures. The *Dameron* court noted that one reason that Dameron became a limited-purpose public figure was because his "name and likeness were often used in these reports." *Id.* at 742. Plaintiff has inflated this specific factual notation to virtually an entire separate prong of the *Waldbaum* analysis, arguing that unless plaintiff Lohrenz's name and likeness were often publicized, she cannot be found to be a limited-purpose public figure. This understanding of *Dameron* and *Waldbaum* is incorrect; the use of a plaintiff's name and likeness is certainly one factor that would incline the Court to hold that plaintiff was a limited-purpose public figure, but it is not an absolute necessity if other facts are present showing that plaintiff satisfies the *Waldbaum* three-part test. Moreover, plaintiff's name and likeness were used

with some frequency, as noted above. Although it is true that in many articles plaintiff was referred to generically as one of two women who had qualified as F-14 pilots, and was referred to by defendants in the Thurmond letter and the Donnelly Report only as "Pilot B," there are many instances of media coverage where plaintiff Lohrenz was identified by name. Indeed, the widespread recognition of plaintiff is a primary component of her claims against defendants–that plaintiff Lohrenz was easily identifiable because of her status as one of the first female F-14 pilots, *despite* any allegedly superficial attempt by defendants to hide her identity by referring to her only as "Pilot B."

Accordingly, it is clear to this Court that plaintiff Lohrenz was a limited-purpose public figure, albeit possibly involuntarily. Therefore, plaintiff's cross-motion for summary judgment, insofar as it seeks an Order finding that the plaintiff was a "private individual" and not a "limited purpose public figure," is DENIED. Further, because plaintiff is a limited-purpose public figure, the standard of *New York Times* applies, and in order to withstand defendants' motion for summary judgment on Counts I and IV, plaintiff must provide "the clear and convincing evidence that a reasonable jury would need in order to find that the defendant published the defamatory material with actual malice." *McFarland v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996).

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B. Actual Malice by Defendants

1. Applicable Legal Standards

Because plaintiff Lohrenz was a limited-purpose public figure, she must show that defendants acted with "actual malice" in publishing their allegedly defamatory falsehoods in order to hold defendants liable for Counts I and IV. That is, plaintiff must show that defendants knew that what they published was false or that defendants published the information with "reckless disregard" for the truth or falsity of the information. *New York Times v. Sullivan,* 376 U.S. 254 (1964). Defendants move for summary judgment, asserting that plaintiff is unable to show that defendants acted with actual malice. Plaintiff has filed a cross-motion on the issue of malice, seeking an Order from the Court finding that defendants did act with actual malice in the publication of the allegations that plaintiff was not a qualified F-14 pilot.

Because of the paramount importance of First Amendment protection for the media, the showing that a public figure must make to hold a media defendant liable for slander or libel is very high.[5] The plaintiff must show that at

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5. Plaintiff does not contest the fact that defendants Donnelly and CMR are entitled to the defamation and invasion of privacy protections available to "media defendants." Nonetheless, the Court notes that the protection of *New York Times v. Sullivan,* 376 U.S. 254 (1964), extends to all defamation defendants, regardless of whether they may be classified as a "media defendant" or a "nonmedia defendant." *See Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985) (affirming judgment of lower court that

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the time of publication, defendants were aware that what they were going to publish was false or acted with "reckless disregard" for the truth or falsity of the information. *Harte-Hanks Comm., Inc. v. Connaughton,* 491 U.S. 657, 667 (1989) ("[T]he defendant must have made the false publication with a high degree of awareness of probable falsity.") (citation omitted); *New York Times,* 376 U.S. at 279-80; *Tavoulareas v. Piro,* 817 F.2d 762, 776 (D.C. Cir. 1987) (en banc) (defendant must have "come close to wilfully blinding itself to the falsity of its utterance").

The standard for actual malice is not what a "reasonable person" or a "prudent publisher" would do, nor can it be defined as "an extreme departure from professional standards." *Harte-Hanks Comm., Inc.,* 491 U.S. at 665; *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *McFarlane v. Sheridan Square Press,* 91 F.3d 1501, 1508 (D.C. Cir. 1996). Further, "a newspaper's motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice." *Harte-Hanks Comm., Inc.,* 491 U.S. at 665. In order

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(Cont'd)
defendant was liable because defamatory statement was about a private issue, but rejecting lower court's rationale that liability could be imposed because defendant was a non-media defendant); *Flamm v. Am. Assoc. of Univ. Women,* 201 F.3d 144 (2d Cir. 2000) ("We agree [with *Dun and Bradstreet*] that a distinction drawn according to whether the defendant is a member of the media or not is untenable."); *Smith v. A Pocono Country Place Prop. Owners' Assoc.,* 686 F. Supp. 1053 (M.D. Pa. 1987) ("[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.") (citation omitted).

to hold defendants liable for defamation against a public figure, plaintiff must show that the actual defendants in question did, in fact, act with "actual malice." *McFarlane,* 91 F.3d at 1508.

Recognizing, however, that defendants are not likely to willingly confess their ill intentions, courts permit plaintiffs to prove "actual malice" by relying upon circumstantial evidence. *Harte-Hanks Comm, Inc,* 491 U.S. at 668. It is important to note that any evidence of actual malice must "necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication." *McFarlane,* 91 F.3d at 1508. In general, there are three types of circumstantial evidence that would likely support a finding of actual malice: (1) evidence that the story was fabricated; (2) evidence that the story was so inherently improbable that only a reckless person would have put it in circulation; or (3) the story was based wholly on a source that the defendant had obvious reasons to doubt, such as "an unverified anonymous telephone call." *St. Amant,* 390 U.S. at 732. A failure to investigate a proposed story or source may support an inference of actual malice only if that failure constituted a "purposeful avoidance of the truth." *Harte-Hanks Comm., Inc.,* 491 U.S. at 693 (holding that media defendant's failure to interview critical and readily available witness supported a finding of malice); *St. Amant,* 390 U.S. at 732 (holding that reckless disregard may sometimes be found where there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports"); *McFarlane,* 91 F.3d at 1510 ("[I]f a defendant has reason to doubt the veracity of its source, then its utter failure to examine evidence within easy reach or to make obvious contacts in

an effort to confirm a story would be evidence of its reckless disregard."). Lastly, a media defendant's "adversarial stance" may be "fully consistent with professional, investigative reporting" and is not "indicative of actual malice." *Liberty Lobby, Inc. v. Rees,* 852 F.2d 595, 601 (D.C. Cir. 1988).

Summary judgment is appropriate in those cases where there is no genuine dispute as to any material fact, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the Court must view all evidence in the light most favorable to the non-moving party, but the non-moving party must proffer proper evidence to support any material factual assertions. *See Bennett v. Spear,* 520 U.S. 154, 168 (1997) ("[A] plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment . . ."). "When the factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255-56 (1986); *see also Nader v. DeToledano,* 408 A.2d 31, 49 (D.C. App. 1979) ("There must be proof from which a reasonable jury acting reasonably could find actual malice by clear and convincing evidence before a plaintiff can survive summary judgment."). The factual issues in this case are generally not in dispute, except for a few facts of minor import, which the Court will note when appropriate. Because the parties are in general agreement about the legally significant facts and because the legal issues are identical, the Court will discuss defendants' motion for summary judgment on the issue of

"actual malice" and plaintiff's partial motion for summary judgment on the issue of "actual malice" together because the legal issues are identical.

The Court will address one preliminary issue before discussing the motions for summary judgment: the date of actual "publication" by defendants of the allegations ultimately contained in the Donnelly Report. Because any analysis of liability for the publication of defamatory falsehoods may consider only information that was known and considered by defendants *at the time of publication,* it is important for the Court to set a "cut off" date. Although neither party has adequately addressed the issue, from the complaint it appears that there are several distinct allegations of defamation of invasion of privacy, which must all be addressed separately. The first "publication" of the allegedly defamatory allegations occurred when defendant Donnelly sent her letter to Senator Thurmond, Chairman of the Senate Armed Forces Committee, on January 16, 1995. See Second Am. Compl. ¶ 33; *see also Croixland Prop. Ltd. Partnership v. Corcoran,* 174 F.3d 213 (D.C. Cir. 1999) (recognizing a defamation claim that was based on a conversation with and letter to Senator John McCain). *Cf. Atkins v. Indus. Telecomm. Assoc., Inc.,* 660 A.2d 885 (D.C. 1995) (holding that there was no publication of a letter because the letter was only sent from defendant to plaintiff). The second instance of possible defamation occurred when defendants published the Donnelly Report on April 25, 1995. *See* Second Am. Compl. ¶ 38-39. The allegations in the Donnelly Report were generally similar to those in the Thurmond letter: that plaintiff, once again referred to only as "Pilot B," was not a qualified to be an F-14 pilot and had been promoted only

because of her gender. The third instance of libel that is clearly alleged in the Second Amended Complaint is the press release from CMR, entitled "Navy Has a Crucial Choice: Principle or Public Relations?" which was released on November 6, 1997. *See* Second Am. Compl. ¶ 46. This press release referred to plaintiff by name and again asserted that she was not a qualified pilot.

The only instance where plaintiffs have alleged slander is a speech given by defendant Donnelly on March 28, 1996, where defendant Donnelly allegedly republished her false and defamatory statements about plaintiff in a speech at the Army-Navy Club in Washington, D.C.[6] See Second Am. Compl. ¶ 52. Once again, defendant Donnelly only referred to plaintiff as "Pilot B," even though by that point it had been reported by the media that plaintiff Lohrenz was, in fact, "Pilot B."

A second fact to be considered by the Court in determining the timing of when the allegedly defamatory statements became effective is whether the references to plaintiff as "Pilot B" were sufficiently specific, or whether only the later media revelation of plaintiff Lohrenz's name effectuated the allegedly defamatory statements contained in the Thurmond letter, the Donnelly Report, and the Army-Navy Club speech. *See Croixland Prop. Ltd. Partnership v. Corcoran,* 174 F.3d 213 (D.C. Cir. 1999) (holding that

6. It is possible that the first claim of slander could run from defendant Donnelly's January 6, 1995 meeting with Adm. Arthur. That meeting is not, however, plead as an incident of slander in the complaint; in fact, it is not even mentioned. Therefore, the Court will disregard it for the purposes of these motions.

allegedly defamatory statement must "lead the listener to conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or is misnamed"). Although defendants do not contest the fact that the allegedly defamatory statements did not "lead" the reader to conclude that "Pilot B" was actually plaintiff Lohrenz, the Court notes for clarity of the record that the allegations in the letter clearly did lead to plaintiff Lohrenz, and that plaintiff Lohrenz was reasonably identifiable from the letter, even if she was not identified by name. It was well-known that there were only two women who were carrier-qualified as F-14 pilots, *see, e.g.,* Defs. Mot. for Summary Judgment, Exh. 8 to Lohrenz Dep. (October 1994 article in the San Diego *Union-Tribune* describing Lt. Hultgreen and plaintiff as the first two females qualified to perform F-14 carrier landings), the Thurmond letter identified plaintiff Lohrenz as Hultgreen's "colleague" in the F-14 squadron, *see* Defs. Mot. for Summary Judgment, Exh. 4 to Donnelly Dep. (Thurmond Letter) at 2, and the Thurmond letter and the Donnelly Report both noted that "Pilot B had reported to VF-124 at the same time as Lt. Kara Hultgreen," *id.*, Exh. 4 to Donnelly Dep. (Thurmond Letter) at 8; *id.*, Exh. 7 to Donnelly Dep. (Donnelly Rept.) at 13 . The attachments to the Thurmond letter and the Donnelly Report went on to describe the alleged training record of "Pilot B" in great detail. This level of specificity is clearly sufficient for a reader, particularly one who was a member of the naval aviation community or was informed about military affairs, to readily and easily identify plaintiff Lohrenz as "Pilot B."

Therefore, for the purposes of the motions for summary judgment on the issue of actual malice, the Court will

consider four separate instances of defamation/invasion of privacy: (1) the January 6, 1995 letter to Senator Thurmond; (2) the April 25, 1995 publication of the Donnelly Report; (3) the March 28, 1996 speech to the Army-Navy Club; and (4) the November 6, 1997 CMR Press Release. For the purposes of analyzing each incident and the level of defendants' possible fault, the Court will only consider information that was known and considered by defendants before each publication.

2. Defendants' Motion for Summary Judgment on the Issue of Actual Malice; Plaintiff's Cross-Motion for Partial Summary Judgment on the Issue of Actual Malice

Both parties have moved for summary judgment, each seeking a favorable ruling on the issue of "actual malice." Because the Court will hold for the following reasons that defendants are entitled to summary judgment on the issue of actual malice, for the purposes of factual description the Court will view the proffered deposition testimony, affidavits, and other competent evidence in the light most favorable to the plaintiff.

Before analyzing the specific instances of allegations of defamation and invasion of privacy, the Court will reject one argument by plaintiff which applies to the complaint generally. Plaintiff alleges that actual malice may be inferred because "Elaine Donnelly had a pre-existing agenda of opposing women in military combat jobs." Pl. Cross-Mot. for Summary Judgment at 34. Any "pre-existing agenda," even one which may be noxious to some minds, is not

indicative of actual malice, and this argument may therefore be summarily rejected. *See Liberty Lobby, Inc. v. Rees,* 852 F.2d 595, 601 (D.C. Cir. 1988).

a. The Thurmond Letter–January 16, 1995

In determining actual malice, the first finding to which the Court must attend is identifying those sources upon which defendants did rely in publishing the alleged libel. Defendants assert that they relied upon information from Lt. Burns, Capt. W. Stewart "Bud" Orr, and Adm. Richardson. The timing, however, of the consultation between defendants, Orr, and Richardson is in doubt, and defendant herself acknowledged in her deposition that she relied only on the information provided by Lt. Burns. Pl. Cross-Mot. for Summary Judgment, Exh. 13 (Donnelly Dep.) at 193. Viewing the facts in light most favorable to plaintiff, the Court finds that defendant Donnelly relied solely upon information from Lt. Burns in drafting the letter to Senator Thurmond.[7] As stated above *supra* section III.B.1, defendants

7. Even if defendant Donnelly did consult with Orr or Richardson, it is uncontested that Lt. Burns was the primary source of information. Orr and Richardson provided, at most, technical information about naval aviation terminology. *See* Pl. Cross-Mot for Summary Judgment, Exh. 13 (Donnelly Dep.), at 191-96. Defendant Donnelly did not show them the letter from Lt. Burns, nor did she solicit their opinions about the training or qualifications of plaintiff Lohrenz. *Id.* at 193 ("I probably asked Admiral Richardson some generic questions about [the letter from Lt. Burns], I probably asked Bud Orr, just to make sure I had my terms correct . . .); Defs. Mot. for Summary Judgment, Donnelly Aff. ¶ 9-10 ("Captain Orr provided background information to [defendant Donnelly] and answered questions regarding technical aviation terms . . .); Pl. Cross-Mot. for Summary Judgment, Exh. 16 (Orr Dep.), at 210-12.

need only show that at the time they published the Thurmond letter, they had no actual knowledge of the falsity of the information, nor did they recklessly disregard indications that the information might be false.

Plaintiff asserts that "there were obvious reasons to doubt the veracity of the [sic] Lt. Burns, yet Donnelly used him anyway as her sole source." Pl. Cross-Mot. for Summary Judgment at 36. Plaintiff asserts that Donnelly failed to properly investigate Lt. Burns' background and level of interaction with plaintiff Lohrenz. Viewing the evidence in the light most favorable to plaintiff, Burns first contacted defendant Donnelly by telephone sometime in late November, 1994, shortly after the death of Lt. Hultgreen. See Pl. Cross-Mot for Summary Judgment, Exh. 13 (Donnelly Dep.) at 179. Burns told defendant Donnelly that he had been one of the instructors of Lt. Hulgreen and of plaintiff, and that they had been trained differently from the other male pilots. *See id.*, Exh. 13 (Donnelly Dep.) at 179. Defendant Donnelly asked Burns about his experiences with Lt. Hultgreen and with plaintiff; Burns identified himself as a lieutenant. *See id.*, Exh. 13 (Donnelly Dep.) at 183-84. Defendant Donnelly then asked Burns to write a letter describing his concerns. *See id.*, Exh. 13 (Donnelly Dep.) at 181. Burns did so, and defendant Donnelly received a letter sometime mid-December 1994. *See id.*, Exh. 13 (Donnelly Dep.) at 188-89; Defs. Mot. for Summary Judgment, Exh. 1 to Burns Dep. (Burns letter). In the letter, Burns once again represented that he had been one of Lt. Hulgreen's and plaintiff's instructors. See Defs. Mot. for Summary Judgment, Exh. 1 to Burns Dep. (Burns letter). Burns described in detail many of the intricacies of F-14 training, piloting and scoring, and

described in particular detail Lt. Hultgreen's training and areas where he believed that Lt. Hultgreen had been permitted to advance where male pilots would not. *See id.*, Exh. 1 to Burns Dep. (Burns letter). Burns then described plaintiff Lohrenz's flight training history on the F-14 with a similar level of detail, and gave his opinion that she was not a qualified F-14 pilot. *See id.*, Exh. 1 to Burns Dep. (Burns letter). Even viewing the evidence in the light most favorable to the plaintiff, this Court's review of the letter sent from Lt. Burns to defendant Donnelly clearly reveals the letter as one that would not be immediately suspect or one that would provide "obvious reasons" to doubt its veracity; much to the contrary, the letter is replete with technical vocabulary, dates, scores, and details that appear to validate the experience and knowledge of the author. Defendants' reliance on the letter from Lt. Burns does not suggest any knowledge of falsity or of reckless disregard for the truth. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968) (holding that reckless disregard for reliance upon a source may only be found where there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

Indeed, plaintiff's own concessions show that defendant is entitled to summary judgment on the issue of actual malice. Plaintiff concedes that defendant Donnelly: (1) did ask Lt. Burns about the extent of his interactions with Lt. Hultgreen and plaintiff Lohrenz, (2) did learn that Burns was a lieutenant who would be able to send her the training records of Lt. Hultgreen and plaintiff Lohrenz; (3) did learn that Lt. Burns was an instructor for Lt. Hultgreen and plaintiff Lohrenz; and (4) did ask Lt. Burns to put his statements in writing. *See* Pl. Cross-Mot. for Summary Judgment at

34-38. Although plaintiff asserts that defendant Donnelly failed to confirm any aspects of Lt. Burns identity or credentials beyond ascertaining that he was a lieutenant, did not suspect that there was anything wrong with a lieutenant sending her the training records of two other pilots when Navy regulations apparently bar that action, did not in more detail determine the extent of Lt. Burns' involvement in plaintiff Lohrenz's training, and did not discuss his length of service as an instructor, these "faults" are not legally significant. Defendants failed to exhaustively research the background of Lt. Burns' because there were no "obvious reasons" for defendant Donnelly to suspect the fallibility of her source. Lt. Burns provided his identity and background, and provided her with a letter detailing his opinions and reasons therefor.

The information obtained and considered by defendant Donnelly clearly puts her outside the narrow range of cases where courts have held that media defendants did act with "actual malice." For example, in *Harte-Hanks Communications, Incorporated v. Connaughton,* 491 U.S. 657 (1989), the Supreme Court affirmed a decision to hold a newspaper liable for publishing defamatory falsehoods about plaintiff, a candidate for judicial office, asserting that plaintiff had attempted to bribe grand jury witnesses. The defendant's sole source was a single witness whose claims were somewhat incredible–she asserted that defendant had promised to take her and her sister to dinner at an expensive French restaurant if he won the election, that he would buy a restaurant for her parents if he won the election, and other fantastic claims. *Id.* at 671-73. The witness asserted that her claims could be proven by a tape-recorded interview session with plaintiff

and seven other individuals; six of the individuals were either related to, were friends with, or worked for the plaintiff. The seventh individual was the witness' sister. The defendant refused to listen to the tape, but then proceeded to interview the six individuals who were related to, friends with, or worked for the plaintiff–that is, witnesses who could be discredited if they disagreed with defendant's allegations. All six denied that any promises had ever been made, and the defendant proceeded to thoroughly discredit them because of their relationship with the plaintiff. The defendant failed to interview the last individual–the sister of the witness–even though she was *readily* available, because she was the only individual present during the taped interview that the defendant could not easily discredit. Id. at 682. Clearly, the facts of that case show a clear evasion from the truth–the refusal to listen to the actual tape, the failure to interview the most important witness, who was easily accessible–that is not present in this case. *See also McFarlane v. Sheridan Square Press,* 91 F.3d 1501 (D.C. Cir. 1996) (finding no actual malice where defendant relied upon source who had been known to fabricate facts and whose story was uncorroborated); *McFarlane v. Esquire Magazine,* 74 F.3d 1296 (D.C. Cir. 1996) (same). In this case, defendants did verify the identity and position of Lt. Burns, did obtain written copies of Lt. Burns position, and did examine carefully and closely the materials submitted by Lt. Burns. Defendants were entitled to rely upon the representations of Lt. Burns in publishing the Thurmond letter, and defendants may not be held liable for their failure to conduct further investigation. *St. Amant v. Thompson,* 390 U.S. 727 (1968).

Appendix B

Plaintiff's next argument is that defendant Donnelly was "specifically and repeatedly warned that she was relying on false data from an unreliable source" before the publication of the Thurmond letter. Pl. CrossMot. for Summary Judgment at 38. The Court is unable to conclude that Donnelly was "specifically and repeatedly warned" that her information was false. Plaintiff relies upon several meetings between defendant Donnelly and Admiral Stanley Arthur, wherein Arthur told defendant Donnelly that he disagreed with her conclusions and Arthur showed Donnelly a copy of a report prepared by Rear Adm. Lyle G. Bien. The only meeting that occurred *before* the Thurmond letter, however, was their first meeting on January 6, 1995, where defendant Donnelly showed Arthur some information she had received from Burns and told Arthur about her suspicions. Arthur made no comment on her conclusions but did promise that he would investigate her charges.[8] *See* Pl. Cross-Mot. for Summary Judgment, Exh. 13 (Donnelly Dep.) at 220-21. Accordingly, no suggestion of actual malice may be drawn from defendant Donnelly's January 6, 1995 meeting with Adm. Arthur.

Plaintiff's final argument is that defendants "never attempted to present a complete view of Lohrenz's training or even to learn what the complete records showed." Pl. Cross-Mot. for Summary Judgment at 43. It is true that defendant Donnelly sent the Thurmond letter before she ever actually received plaintiff Lohrenz's training records.

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8. Plaintiff asserts that defendant Donnelly spoke with Admiral Stanley Arthur three other times, met with Adm. Mike Boorda, and spoke at least once with Commander Thomas Sobieck. Because these conversations occurred after the Thurmond letter, they will be discussed *infra* section III.B.2.b.

See Pl. Cross-Mot. for Summary Judgment, Exh. 13 (Donnelly Dep.) at 205. As stated above however, the letter from Lt. Burns contained detailed and specific descriptions of the training records of Lt. Hultgreen and of plaintiff Lohrenz. Defendants' failure to attempt to obtain actual copies of plaintiff's training records does not evidence "actual malice." There is no duty for a defamation defendant to conduct further investigation, unless the failure to conduct further investigation was so glaringly deficient that the Court could infer that defendants acted with "reckless disregard." *Harte-Hanks Comm., Inc. v. Connaughton,* 491 U.S. 657, 667 (1989). There is an insufficient basis for the Court to find that a reasonable juror could conclude that defendants acted with reckless disregard in their failure to conduct further investigation into plaintiff Lohrenz's training records before publishing the Thurmond letter.

On the record now before the Court, the Court finds that defendants' Motion for Summary Judgment will be GRANTED and plaintiff's Motion for Partial Summary Judgment will be DENIED, insofar as those motions addresses "actual malice" in the publication of the Thurmond letter.

b. The Donnelly Report–April 25, 1995

The Court must determine, viewing the evidence in the light most favorable to the plaintiff, what information was considered by defendants before the publication of the allegedly false and defamatory statements on April 25, 1995. Obviously, the information possessed by defendants before the Thurmond letter, discussed *supra* section III.B.2.a,

continued to be in defendants' possession, and so the Court will incorporate that discussion here and will discuss in this section only those events that occurred between the publication of the Thurmond letter on January 16, 1995 and the publication of the Donnelly Report on April 25, 1995.

On or about March 3, 1995, Lt. Burns sent defendant Donnelly copies of *portions* of plaintiff's training records. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 13 (Donnelly Dep.) at 227-28, 332; Defs. Mot. for Summary Judgment, Exh. 3 to Burns Dep. (Burns second letter) ("Dear Elaine, Please find enclosed the flight training records that you and I disucussed. I realize that there is a lot of material here to digest and therefore, have tried to streamline and organize all of the documents in a logical manner."). Defendants reviewed those records, had Capt. Orr review the records, Pl. Cross-Mot for Summary Judgment, Exh. 13 (Donnelly Dep.) at 351-52, and discussed the records with Adm. Arthur, *id.*, Exh. 13 (Donnelly Dep.) at 25963. Orr expressed the opinion that plaintiff was not a qualified pilot. *See id.*, Exh. 16 (Orr Dep.) at 196-97, 210-11. Adm. Arthur neither confirmed nor denied the records shown to him by defendant Donnelly, but did tell her that he strongly disagreed with her conclusions. *See id.*, Exh. 11 (Arthur Dep.) at 35-44; *id.*, Exh. 13 (Donnelly Dep.) at 259-63.

During the period of time after the publication of the Thurmond letter but before the Donnelly Report, defendant Donnelly had several additional meetings with Navy officers. During the period after the publication of the Thurmond letter but before the publication of the Donnelly report, defendant Donnelly met with Adm. Arthur twice (February 8, 1995 and

March 24, 1995), spoke on the telephone once with Adm. Arthur (March 6, 1995), met with Adm. Mike Boorda once (March 6, 1995), and spoke once with Cmdr. Thomas Sobieck (date unknown). At each meeting, defendant Donnelly was told that her conclusions were incorrect. On February 8, 1995, Adm. Arthur cautioned defendant Donnelly that "it appeared . . . that whoever was providing the information was providing selected parts of the information," that it appeared that defendant Donnelly was receiving information from a person who " had an agenda," and that she should be careful about the conclusions that she might draw from the information. *See id.*, Exh. 11 (Arthur Dep.) at 41, 51, 52, 53. Plaintiff asserts that Adm. Arthur flatly told defendant Donnelly that her allegations were false and that Lt. Hultgreen and plaintiff Lohrenz were qualified pilots. On March 6, 1995, defendant Donnelly met with Adm. Boorda; he told defendant Donnelly that he believed that plaintiff was a well-qualified F-14 pilot, and that he disagreed strongly with the conclusions that she had drawn. *See id.*, Exh. 13 (Donnelly Dep.) at 200, 267-68. That evening, defendant Donnelly spoke on the telephone with Arthur, and he repeated his belief that the allegations were false, and that defendant Donnelly was receiving informationfrom a "disgruntled aviator." *See id.*, Exh. 13 (Donnelly Dep.) at 268-69. On March 24, 1995, defendant Donnelly met again with Arthur. At this third meeting, defendant Donnelly did have copies of portions of plaintiff's training records, and she reviewed those records with Arthur. Defendant Donnelly was also allowed to read a copy of a report authored by Rear Admiral Lyle G. Bien, *see id.*, Exh. 11 (Arthur Dep.) at 46-47, which was specifically prepared in response to the allegations that defendant

Donnelly had raised at the first meeting with Adm. Arthur. The Bien Report actually validated much of the underlying information in the possession of defendant Donnelly. *See id.,* Exh. 11 (Arthur Dep.) at 53. The Report did conclude that the facts contained in the Thurmond letter were "largely accurate" and that Bien had "found evidence of special considerations given to three female aviators . . . [and] in the case of [plaintiff], significantly greater concessions were made." *Id.,* Exh. 9 (Bien Rept.). It did, however, dispute many of her facts; contrary to the facts cited by defendant Donnelly, Bien noted that there were two male pilots who had scores lower than plaintiff's, there were no instances where male students had been permanently disqualified with scores higher than plaintiff's, and the allegation by Donnelly that an instructor had changed one of plaintiff's scores from a "down" to an "up" was false. *Id.,* Exh. 9 (Bien Rept.). The Bien Report also disagreed with defendant Donnelly's conclusions that female and male aviators had been subject to different standards, and that plaintiff Lohrenz was not a qualified pilot. *See id.,* Exh. 9 (Bien Rept.).

Lastly, plaintiff asserts that shortly before the publication of the Donnelly Report, defendants were contacted by telephone by the commanding officer of the FRS, Commander Thomas Sobieck. *See id.,* Exh. 13 (Donnelly Dep) at 375-76. Sobieck apparently called defendant Donnelly to discuss primarily the Tailhook scandal, *see id.,* Exh. 13 (Donnelly Dep.) at 352, 376. The evidence describing the substance of the conversation is muddled, but viewing the evidence in the light most favorable to the plaintiff, it appears that Sobieck told defendant Donnelly that there were no safety-of-flight concerns about plaintiff, that plaintiff's

training record should not have resulted in the convening of an FNAEB, and that the same standards were applied to male and female aviators. *See id.*, Exh. 13 (Donnelly Dep.) at 374-402. Sobieck did, however, admit that plaintiff had been a "timid" flier, that she often repeated errors that she had made before, and that she was struggling. *Id.*, Exh. 13 (Donnelly Dep.) at 353-54. Shortly thereafter, the Donnelly Report was published.

Plaintiff asserts that the events described support an inference of "actual malice" because defendant Donnelly was informed clearly and repeatedly that her information was incorrect, because defendant Donnelly never sought to obtain a full copy of plaintiff's training records, because defendant Donnelly selectively edited the portion of plaintiff's training records that she did have in her possession, and because the Donnelly Report contained factual errors. On the extensive record now before the Court, the Court finds that summary judgment in favor of defendants is appropriate because plaintiff has not shown that defendants acted with "actual malice" in publishing the Donnelly Report.

First, although defendant Donnelly did meet several times with Navy officers who disagreed strenuously with her conclusions, no inference of malice may be drawn. Between the publication of the Thurmond letter and the Donnelly Report, it appears that defendant Donnelly did make attempts to investigate the veracity of the information contained in the December letter from Lt. Burns and the copies of plaintiff's training records sent to defendants from Lt. Burns. As part of her investigation, defendant met several times with Navy officials and reviewed at least one Navy report.

Appendix B

The interactions between defendant Donnelly and Navy officials can only be characterized as partial agreement and partial disagreement; that is, Arthur, Bien, and Sobieck all confirmed that defendant Donnelly had some correct facts concerning plaintiff's training records, but they all disputed the conclusions that she had drawn from those records. Lt. Burns, also a Navy officer, had told defendant Donnelly that plaintiff was not a qualified pilot, and that the Navy had applied double standards. Even viewing the evidence in the light most favorable to the plaintiff, it appears that there was an historical record that is probably common to issues of great public interest and debate–facts and conclusions that are hotly contested, but are open to vastly different interpretations, all of which are protected by the First Amendment. No actual malice may be inferred from these disputes between defendants and the Navy officials.

Second, no inference of malice may be inferred defendant Donnelly's failure to obtain full and complete copies of plaintiff's training records. There is no duty for a defamation defendant to conduct further investigation, unless the failure to conduct further investigation was so glaringly deficient that the Court could infer that defendants acted with "reckless disregard." *Harte-Hanks Comm., Inc. v. Connaughton,* 491 U.S. 657, 667 (1989). There is an insufficient basis for the Court to conclude that defendants acted with reckless disregard in their failure to conduct further investigation into plaintiff Lohrenz's training records before publishing the Donnelly Report, because defendant Donnelly did obtain portions of plaintiff's training records, did confirm that facts contained in those records were correct, and did base her publication on those portions.

Third, no inference of malice may be drawn from defendant Donnelly's "selective editing" and labeling of plaintiff's training records, even if the editing and labeling did create a false impression that plaintiff was not a qualified pilot. It is generally accepted that media defendants are not compelled the publish the entirety oftheir sources and may edit or abridge their sources as they see fit. *See McFarlane v. Esquire Magazine, et al.*, 74 F.3d 1296, 1306-07 (D.C. Cir. 1996) (holding that defendants did not act with "actual malice" when they selectively edited out remarks which would have cast doubt upon the integrity of their primary source). This is particularly applicable in the instant case, because defendants included a specific note in the Donnelly Report that the "[d]ocuments presented in this compendium of information have been selected to demonstrate a pattern of flexible or double standards in naval aviation."[9] *See* Pl. Cross-Mot. for Summary Judgment, Exh. 17 (Donnelly Report) at 3.

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9. In support of her argument, plaintiff proffered the Declaration of Captain Charles Nesby, who concluded that

> [t]he selective use of a few records, the misrepresentations of the meaning of the records she did use, and the magnitude of the deception dictates only one conclusion–that Elaine Donnelly and the people who helped her intended to deceive the Senate Armed Services Committee, Lt. Lohrenz's superiors in her chain of command, and, after release of the CMR report, Lt. Lohrenz's fellow officers and the general public.

Pl. Cross-Mot. for Summary Judgment, Exh. 1 (Nesby Decl.) at 13. As previously discussed, the Court does not accept any part of Captain Nesby's Declaration which might be construed as a legal conclusion.

(Cont'd)

Fourth, no inference of actual malice may be drawn from the fact that the Donnelly Report did allegedly contain some misstatements of fact.[10] Defendant Donnelly did take care in verifying her facts and sources sufficient to preclude summary judgment for the plaintiff. *See McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511-13 (D.C. Cir. 1996) (finding no actual malice where defendant knew that source had credibility problems, and there were incongruities between source's representation that he had been at a meeting in Paris and the stamps in his passport). The Court will not impose liability for mere factual error–an everyday occurrence in journalism–unless those errors rise to the level of circumstantial evidence of "actual malice." The errors in the Donnelly Report did not rise to that level. *See id.*

(Cont'd)
Captain Nesby may be qualified as an expert to interpret, explain, and compare the training records of an F-14 pilot, but he is not qualified to make any conclusions about the subjective intent of defendants in any legal sense. *See supra* § II.A.

10. Rear Adm. Bien prepared a supplemental report in response to the Donnelly Report. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 10 (Bien Suppl. Rept.). That report noted that although the facts of the Donnelly Report were "largely accurate," *id.*, Exh. 10 (Bien Suppl. Rept.) at 1, there were three specific misstatements of fact. First, Bien asserts that it was untrue that plaintiff had the lowest night carrier-qualification grades in the history of the FRS. Second, Bien found that contrary to the Donnelly Report, many Navy officers were actually predisposed to see the female aviators *fail*. Third, Bien asserted that the allegation that Sobieck had improperly changed one of plaintiff's scores from a "down" to an "up" was incorrect.

Appendix B

On the record now before the Court, the Court finds that defendants' Motion for Summary Judgment will be GRANTED and plaintiff's Motion for Partial Summary Judgment will be DENIED, insofar as those motions addresses "actual malice" in the publication of the Donnelly Report.

c. The Army-Navy Club Speech–March 28, 1996

The Court's discussion of the information possessed and considered by defendants will, of course, incorporate the Court's prior discussion about the information known to defendants before the publication of the Thurmond letter and the Donnelly Report, discussed *supra* sections III.B.2.a and III.B.2.b. Only two events of note occurred between the April 25, 1995 publication of the Donnelly Report and the March 28, 1996 Army-Navy Club speech that might have had any effect on the information known to defendants. First, on May 4, 1995, Rear Adm. Bien published a Supplemental Report in response to the Donnelly Report. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 10 (Bien Suppl. Rept.). Second, defendant Donnelly had a second conversation with Cmdr. Thomas Sobieck on May 2, 1995 about the Donnelly Report. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 13 (Donnelly Dep.) at 376.

The Bien Supplemental Report came to generally the same conclusions as the original Bien Report–that the bulk of the information reported by defendant Donnelly was correct, but that she had come to the wrong conclusion about plaintiff's flight qualifications and the issue of "double standards" in the military. *Compare* Pl. Cross-Mot. for

Summary Judgment, Exh. 9 (Bien Rept.), *with id.*, Exh. 10 (Bien Suppl. Rept.). In his Supplemental Report, Bien asserts that the Donnelly Report was driven by her own political agenda, but he conceded that "the sections discussing the training records of the female aviators are largely accurate." *Id.*, Exh. 10 (Bien Suppl. Rept.). Ultimately, no inference of "actual malice" may be drawn from the Bien Supplemental Report because the Supplemental Report did partially confirm many of defendant Donnelly's facts (although strongly disputing the ultimate conclusions that she drew from those facts), and because the substance of the Bien Supplemental Report is generally very similar to the original Bien Report, and as discussed *supra* section III.B.2.b, no inference of actual malice could be drawn from the original Bien Report.

The May 2, 1995 conversation between Sobieck and defendant Donnelly similarly leads to no inference of "actual malice." Viewing the evidence in the light most favorable to the plaintiff, Sobieck told defendant Donnelly that standards were never lowered in order to assure the promotion of plaintiff, that there were no safety-of-flight concerns about plaintiff, that plaintiff's record should not have supported the convening of an FNAEB, and that plaintiff's grades were never changed in order to prevent her dismissal from the FRS. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 15 (Jenckins Notes). Sobieck neither confirmed nor denied any of the facts in the Donnelly Report, except to say that he had not changed any of plaintiff's scores, as had been alleged in the Donnelly Report. *Id.*, Exh. 15 (Jenckins Notes). This conversation may not be the basis for any inference of "actual malice"; as has been discussed by the Court, defendant Donnelly had previously encountered these same

statements from Navy officials, and may not be held liable for her decision to publish a statement that contradicted the beliefs and conclusions of the Navy officials. No inference of "actual malice" may be drawn from Sobieck's further response to defendant Donnelly after the publication of the Donnelly Report.

Lastly, even to the extent that the Bien Supplemental Report and the May 2, 1995 conversation with Sobieck might have changed or altered the information known to defendants or pointed out factual errors in the Donnelly Report, there is no duty to retract or correct a publication, even where grave doubt is cast upon the veracity of the publication after it has been released. *See McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996).

On the record now before the Court, the Court finds that defendants' Motion for Summary Judgment will be GRANTED and plaintiff's Motion for Partial Summary Judgment will be DENIED, insofar as those motions addresses "actual malice" in the publication of the Army-Navy Club speech.

d. The CMR Press Release–November 6, 1997

The Court must discuss "actual malice" for the CMR press release of November 6, 1997 separately because between the Army-Navy Club speech in March of 1996 and November of 1997, the Navy Inspector General released a report of its investigation of, in part, the allegations made by plaintiff and her parents about the Navy's decisions to remove plaintiff from the F-14 carrier training program. That Report

was released on February 10, 1997; on November 6,1997, defendants issued a press release that noted, among other comments about plaintiff, a "pattern of major errors, low scores, and preferential treatment for . . . Carey Dunai Lohrenz." See Second Am. Compl., Exh. 13 (November 1997 CMR press release).

The Navy Inspector General Report made the following conclusions which are relevant to these motions: (1) plaintiff was not given preferential treatment while she was training in the FRS; (2) after being assigned to the FRS, plaintiff's flying techniques became dangerous, and she continued her techniques after many attempts by instructors to correct her; (3) plaintiff knew that her performance was substandard and received ample counseling and advice; (4) the FNAEB Report was flawed, but the conclusions were ultimately fair and correct; and (5) that plaintiff's performance was negatively affected by media attention and stress. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 5 (Inspector Gen. Rept.) at v-vi. Plaintiff asserts that because defendants continued to publish defamatory falsehoods about plaintiff, even after the issuance of the Navy Inspector General Report (which plaintiff alleges conclusively rebuts the Donnelly Report), clear and convincing evidence of "actual malice" exists.[11]

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11. Plaintiff also asserts that even if her performance level did decline to the level at which she should have been released from her training program, the fault lies with defendants because her decline was caused by the stress which resulted from the Thurmond letter, the Donnelly Report, and the subsequent Navy investigations and media attention. The Inspector General Report did conclude that the media attention in general, from the Donnelly Report and other parties

(Cont'd)

Appendix B

Contrary to plaintiff's assertion that the Navy Inspector General Report conclusively rebutted the Donnelly Report, even viewing the evidence in the light most favorable to plaintiff, the Report followed the same pattern of partial agreement and partial disagreement that characterized defendants' interactions with the Navy. The Report considered plaintiff's landing techniques, and found that although her performance upon reporting to the U.S.S. Lincoln was good, it declined in late 1994. Pl. Cross-Mot. for Summary Judgment, Exh. 6 (Inspector Gen. Rept.) ¶¶ 268-91. Although the Report noted that plaintiff's reviews included such comments as "talented pilot, smooth," "willingness to learn," and a "capable aviator," plaintiff was also criticized for being "not as aggressive as she needs to be," not having "progressed with her peers,"and for being "inconsistent," "sporadic," "high and overpowered," and "unsafe." *Id.*, Exh. 6 (Inspector Gen. Rept.) ¶¶ 277-78. In the end, the Navy Inspector General concluded that the

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(Cont'd)

and before and after the death of Lt. Hultgreen, had caused stress upon the plaintiff that was a contributing factor to plaintiff's poor performance. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 6 (Inspector Gen. Rept.) ¶¶ 155-68, 182-264. The Inspector General Report made, however, no conclusion about whether plaintiff should have been returned to flight status if she were treated for her extreme stress. Id., Exh. 6 (Inspector Gen. Rept.) ¶ 267. The Report did conclude that as a result of the stress plaintiff suffered, that when she appeared before the FNAEB, plaintiff was not physically qualified to fly. *Id.*, Exh. 6 (Inspector Gen. Rept.) ¶¶ 264, 314. Further, the causes of plaintiff's stress may be relevant to the Navy's evaluation of plaintiff or perhaps even a debate about the political utility of defendants' Report, but are not relevant to an analysis of whether defendants acted with "actual malice" in the 1997 press release.

FNAEB Report had been correct in concluding that plaintiff was not a suitable pilot for the carrier environment, *id.*, Exh. 6 (Inspector Gen. Rept.) ¶¶ 300-01, because she did not rate well on factors such as "receptivity to instruction," "response to [landing signals officers]," "trend of improvement," and "officer-like qualities," *id.*, Exh. 6 (Inspector Gen. Rept.) ¶ 438.

The Inspector General Report also examined the proceedings and recommendations of the FNAEB, which concluded that plaintiff should be removed from the F-14 carrier program. Plaintiff and her parents made the following complaints about the FNAEB Report and its implementation[12]: (1) male landing signal officers graded female aviators more stringently than male aviators; (2) the FNAEB should not have been convened at all, for various reasons; (3) plaintiff was given no warning that the FNAEB was to be convened, while male pilots were given warnings; and (4) there were inconsistencies, inaccuracies and emotionalism in the FNAEB Report. *Id.*, Exh. 6 (Inspector Gen. Rept.) ¶ 315. The Navy Inspector General concluded that the bulk of the complaints against the FNAEB were unsubstantiated. Id., Exh. 6 (Inspector Gen. Rept.) ¶¶ 335, 347, 358, 414, 471. The Report did, however, find that there was substantiation for the allegation that there were "inconsistencies, inaccuracies and emotionalism" in the Report because plaintiff's commanding officer had made

12. As discussed in the factual background of this case, the FNAEB Report recommended that plaintiff be permitted to retain her flight status, but that she be removed from a carrier-based environment. Plaintiff's commanding officer rejected the recommendation, and removed plaintiff from flight status entirely.

comments about whether plaintiff's possible retention of her flight status would be fair to involuntarily separated reservists (other Navy aviators who had been, in effect, laid off by the military's "rightsizing" program) and how it might affect "fleet morale." *Id.*, Exh. 6 (Inspector Gen. Rept.) ¶¶ 416-37. The Inspector General concluded that those remarks and considerations were inappropriate and irrelevant to the FNAEB process, that the offending remarks should be removed from the FNAEB Record, and that the FNAEB's recommendation that plaintiff retain her flight status (but in a non-carrier environment) should have been accepted by plaintiff's commanding officer. Id., Exh. 6 (Inspector Gen. Rept.) ¶¶ 438-44. Nonetheless, the Inspector General concluded the FNAEB Record as a whole was consistent and justified. *Id.*

The Navy Inspector General Report, therefore, was mixed in its conclusions. While noting that there had been inconsistencies in the FNAEB Report, the Inspector General concluded that plaintiff did have performance problems and that the recommendations of the FNAEB Report were supportable. In terms of the issue of double standards, the Navy Inspector General did conclude that plaintiff had been subject to the same standards as the male pilots–but this conclusion is the same as the Bien Report and the Bien Supplemental Report, as well as the prior oral representations of Arthur, Boorda, and Sobieck. As discussed, the Navy's mere disagreement with defendants' conclusions cannot support a finding of "actual malice." Particularly because defendants did receive confirmation of many of the underlying facts upon which they based their allegedly defamatory falsehoods, under the First Amendment

defendants are allowed to view, and publicize their view, that the conclusions of the Navy Inspector General, Bien, Arthur, Boorda, and Sobieck were merely the Navy's "party line." Though the Navy Inspector General Report appears to be the most detailed and conclusive investigation into the personnel decisions made by the Navy about plaintiff, plaintiff has failed to show that the findings of the Report support any inference that defendant acted with actual malice.

On the record now before the Court, the Court finds that defendants' Motion for Summary Judgment will be GRANTED and plaintiff's Motion for Partial Summary Judgment will be DENIED, insofar as those motions addresses "actual malice" in the publication of the CMR Press Release.

In sum, because defendants have shown that there are no issues of material fact in dispute and that defendants are entitled to judgment as a matter of law on the issue of "actual malice," the Court will GRANT defendants' Motion for Summary Judgment, will DENY plaintiff's Motion for Partial Summary Judgment, and will grant judgment for defendants on Counts I and IV.

3. Other Issues Raised by Defendants' Motion for Summary Judgment

Defendants assert that they are entitled to summary judgment on Counts I and IV on the alternative grounds that the allegations published in the Thurmond letter, the Donnelly Report, the Army-Navy Club speech and the CMR press release were "substantially true." Defendants also assert that

plaintiff's claims which seek relief for statements that were published by defendants based on the Report of the Navy Inspector General are barred by the "Fair Reporting" doctrine. Although the Court has already held that defendants are entitled to summary judgment on Counts I and IV, the Court will briefly discuss these issues for the clarity of the record.

a. "Substantial Truth" Doctrine

It is established law that truth is an absolute defense to an action for defamation. *Olinger v. Am. Savings and Loan Assoc.*, 409 F.2d 142, 144 (D.C. Cir. 1969). To successfully assert this defense, a defendant in a defamation action must prove that the statement made were substantially true, and that any minor misstatements of fact or inaccuracies of expression were immaterial. *Moldea v. New York Times*, 22 F.3d 310, 318 (D.C. Cir. 1994). A finding that a statement was "substantially true" precludes a finding of "actual malice." *Liberty Lobby v. Rees*, 852 F.2d 595, 601 (D.C. Cir. 1988).

Defendants assert that their statements in the Thurmond letter, the Donnelly Report, the Army-Navy Club speech, and the CMR Press Release were "substantially true" because the Bien Report and the Bien Supplemental Report, discussed *supra* sections III.B.2, concluded that the facts included in the Thurmond letter and the Donnelly Report were "largely accurate." *See* Defs. Mot. for Summary Judgment, Exh. 6 to Donnelly Dep (Bien Rept.); *id.*, Exh 8 to Donnelly Dep. (Bien Suppl. Rept.). On the basis of these comments and other negative comments in the Navy record about plaintiff's

flying abilities, defendants move this Court to conclude that plaintiff was, in fact, an inadequate pilot who was promoted solely because of double standards. This the Court cannot do.

Contrary to defendants' assertion that the record "unequivocally" establishes the issue of double standards and of plaintiff's flying abilities, the record is extremely muddled. While it does appear true that plaintiff did have some difficulties in piloting and landing F-14's in a carrier environment, it is equally true that *every pilot* has difficulty completing these difficult tasks. It is highly contested whether plaintiff's records and scores were above or below the minimum required, the causes for the possible decline in plaintiff's performance, and whether plaintiff's original assignment to the FRS was a result of merit, political pressure, or both. Every report and statement issued by the Navy has definitively concluded that although plaintiff Lohrenz may not have been suited for some types of piloting, she was promoted because of her abilities and not because of any alleged "double standards." Plaintiff has also submitted multiple declarations from knowledgeable individuals that plaintiff was, in fact, a highly qualified pilot who performed well at the FRS. *See* Pl. Cross-Mot. for Summary Judgment, Exh. 2 (Kilian Decl.); *id.*, Exh. 3 (Carel Decl.); *id.*, Exh. 7 (Whetstone Decl.); *id.*, Exh. 8 (Marotta Decl.). Therefore, the Court cannot conclude that defendants' statements were "substantially true."

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b. "Fair Reporting" Doctrine

In the District of Columbia, the publication of defamatory material concerning a plaintiff in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern will not subject a defendant to liability for defamation if the report is accurate and complete or a fair abridgment of the occurrence reported. *Harper v. Walters,* 822 F. Supp. 817, 823 (D.D.C. 1993). "Once a report is deemed 'official,' an *accurate* publication of its contents is privileged, regardless of their veracity," id. (emphasis added); that is, the privilege will not apply if the publication of the report is not fair and accurate, id. Defendant now asserts that the November 6, 1997 CMR press release, which noted a "pattern of major errors, low scores, and preferential treatment for . . . Carey Dunai Lohrenz" and also that plaintiff Lohrenz was "unsafe, undisciplined, and unpredictable," *see* Second Am. Compl., Exh. 13 (November 1997 CMR press release), is protected by the "fair reporting" doctrine.

The Court found *supra* section III.B.2 that defendants did not publish with "actual malice" the Thurmond letter, the Donnelly Report, the Army-Navy Club speech, or the CMR Press Release. Defendants' motion, insofar as it is based upon the application of the fair reporting doctrine, would require this Court to make a finding regarding the "fairness" and "accuracy" of defendants' reporting of the Bien Report, the Bien Supplemental Report, and the Navy Inspector General Report. Because the Court has already held that defendants are entitled to summary judgment on the issue of actual malice, there is no need for the Court to determine

whether the Fair Reporting doctrine applies, so the Court declines to make any finding as to whether defendants' publications were "fair" or "accurate" representations of the Navy reports.

IV. Conclusion

Pursuant to the analysis of this Memorandum Opinion, the Court will DENY defendants' Motion to Strike, GRANT defendants' Motion for Summary Judgment, DENY defendants' Motion for Oral Hearing, and DENY plaintiff's Cross-Motion for Partial Summary Judgment.

A separate Order accompanying this Memorandum Opinion will issue this day.

Royce C. Lamberth
United States District Judge

Date:

(2)

Supreme Court, U.S.
FILED
APR 8 - 2004
OFFICE OF THE CLERK

No. 03-1272

In the Supreme Court of the United States

CAREY DUNAI LOHRENZ,
Petitioner,

v.

ELAINE DONNELLY,
Center for Military Readiness, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment requires that an officer in the United States Navy who was the first female pilot to be assigned directly from the training command to the F-14 Tomcat fighter aircraft in June 1993, be treated as a "limited-purpose public figure" for purposes of the law of defamation, where the officer voluntarily chose such assignment during a period when a pre-existing substantial public controversy existed over the assignment of women to combat positions in the United States Armed Forces and where a substantial related controversy existed as to whether the United States Navy applied double standards in the training of its female combat pilots in order to gender-integrate close combat units in the United States Armed Forces.

2. Whether one of the first female pilots trained to fly the F-14 Tomcat fighter aircraft should be deemed a "limited-purpose public figure" when she voluntarily chose such military assignment at a time in which the role of women in combat and the issue of double-standards in the training of females for combat positions were the subject of substantial public controversy and debate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent, CENTER FOR MILITARY READINESS respectfully submits this Corporate Disclosure Statement.

Respondent, CENTER FOR MILITARY READINESS, a Michigan non-profit corporation, is not a publicly held company, and there is no parent or publicly held company owning 10% or more of the stock of CENTER FOR MILITARY READINESS.

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OPINION BELOW

On December 12, 2003 the United States Court of Appeals for the District of Columbia Circuit rendered its published opinion in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003) (Pet.App.A). The Memorandum Opinion of the United States District Court for the District of Columbia, published at 223 F.Supp.2d 25 (D.D.C. 2002), was rendered on August 16, 2002 (Pet.App.B).

STATEMENT OF JURISDICTION

This Honorable Court possesses jurisdiction pursuant to 28 U.S.C. §1254(1) and the Petition was filed within ninety (90) days of the rendering of the published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law... abridging the freedom of speech, or of the press...."

STATEMENT OF THE CASE

Respondent ELAINE DONNELLY is the President of Respondent CENTER FOR MILITARY READINESS, an independent, non-profit public policy organization that advocates sound military personnel policies. Contrary to Petitioner's representations, statements and documents produced by the Respondents were published not to oppose women in combat, but for the clearly defined purpose of promoting high, uncompromised standards in carrier aviation,

the Navy's most hazardous occupation. Respondents have consistently supported high standards for both men and women in all forms of military training.

The Petitioner, Lt. Carey Dunai Lohrenz (LOHRENZ), was sworn into the Navy as an officer candidate in 1990, and graduated from Aviation Officer Candidate School with academic honors and received her commission on May 17, 1991. She successfully completed Primary Flight Training on February 3, 1992 with first place honors (Commodore's List). As a consequence of those achievements, LOHRENZ was permitted to choose between jet aircraft, propeller driven aircraft, or helicopters. She voluntarily chose the jet "pipeline." As she ranked in the top of her class, later she was able to choose her preferred choice of aircraft, and she consciously chose carrier-based combat aviation.

LOHRENZ voluntarily chose Navy tactical aviation in the midst of a substantial national controversy over women in combat,[1] a controversy of which she was well aware. LOHRENZ actually testified before the Naval Inspector General (IG) that she entered combat aviation despite warnings from her father. LOHRENZ chose combat aviation by filling out her "dream sheet" for future assignment on April 23, 1993, two days after then-Secretary of Defense Les Aspin, in a most controversial move, lifted the Navy's exclusion on the assignment of women to combatant aircraft. Well aware of Aspin's official actions, LOHRENZ listed her

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[1] The Petitioner essentially concedes that a pre-existing public controversy existed over women in combat at the time she chose to become an F-14 fighter pilot. *Petition*, at 1 ("At the time Lohrenz became an F-14 fighter pilot, the role of women in combat was controversial"). Such concession is a marked reversal from the contentions made by Petitioner in the courts below.

preferences as "[F-18] Hornets West Coast, [F-18] Hornets East Coast, F-14s West Coast, F-14s East Coast, and possibly A-6s," all combat aircraft assignments.

On June 25, 1993 LOHRENZ became the first female pilot to be assigned directly from the training command to a combat aircraft -- the F-14 Tomcat. LOHRENZ was sent to NAS Miramar in San Diego in July 1993 for training in VF-124, an F-14 Fleet Replacement Squadron ("FRS") -- previously known as a Replacement Air Group ("RAG"). Contrary to the Petitioner's claims, LOHRENZ's FRS training records, which included numerous failing grades marked by "pink sheets" for unsatisfactory performance, illustrated that she struggled from the very start of F-14 training, which ended in July 1994.

LOHRENZ was in the same class at NAS Miramar with the late Lt. Kara Hultgreen, and both women "carrier qualified" on their second attempts in July 1994. LOHRENZ and Hultgreen joined VF-213, a fighter squadron then attached to the U.S.S. *Abraham Lincoln*. Both women were recognized as "pioneers" in Naval combat aviation, an accomplishment that LOHRENZ admitted resulted in significant media attention. LOHRENZ herself recognized that a "double standards" issue existed when she was quoted in a story in the September 7, 1993 Milwaukee *Journal*, titled "Pilot May Be First to Break a Navy Gender Barrier," as saying: "I don't get any preferential treatment because I'm a woman, and the guys in my squad treat me as an equal."

On October 25, 1994 Lt. Kara Hultgreen died as she crashed her F-14 while trying to land it on the *Abraham Lincoln*. Multiple newspaper and television stories followed the tragedy, debating issues of women in combat aviation, double-standards in the training of female fighter pilots and

the credibility of the Navy in claiming that "engine failure" was the primary cause of the mishap. Six months before the publication of the *Special Report: Double Standards in Naval Aviation*, most news stories that questioned Hultgreen's training directly or indirectly questioned LOHRENZ's as they both received their training together. On October 27, 1994 an article appeared in the San Diego *Union-Tribune*, referring to Hultgreen and "another woman" as "the first two females to qualify to take off and land supersonic fighters on carrier decks," and questioning whether Hultgreen should have been graduated to the fleet. It stated:

> ... officers, who declined to be identified by name, contended that she was allowed to advance because of pressure from senior officials eager to change the image among some that the naval aviation community is a chauvinistic boys' club hostile to women.

The *New York Times* of October 30, 1994, in an article titled "Pilot's Death Renews Debate Over Women in Combat Role," claimed:

> Some male pilots have complained that the first group of women allowed to fly combat missions since the Pentagon lifted a ban last year have received preferential treatment from a Navy hierarchy eager to push them through the training pipeline to erase the stain of the Tailhook sexual harassment scandal. Navy officials adamantly deny this.

The *New York Times* article was re-published in the San Diego *Union-Tribune* on October 30, 1994.

> A *Navy Times* editorial of November 7, 1994 stated: some male pilots think standards have been lowered,

> and lives jeopardized, out of the Navy's desire to be politically correct is also a given, whether true or not. Has the Navy rushed some women through aviation training, perhaps as part of a post-Tailhook strategy to reinstate the service's good name among some of its toughest critics? We don't know. But it's a question worth pursuing and one that, if true, needs immediate correction.

That same day, the cover story of the *Navy Times* read:

> Now that the first female combat pilot has been lost at sea, questions will inevitably be raised about Lt. Kara S. Hultgreen's training, skills and qualifications. In fact, those questions began just hours after her plane went down. West Coast officers familiar with her squadron said some of her colleagues felt that she **and VF-213's other female pilot, Lt. (jg) Carey Lohrenz**, were being pushed too fast and perhaps under too much pressure -- from the Navy, **the media and everyone else putting the spotlight on the first women pilots.**

(Emphasis added).

On November 11, 1994 a segment of the CBS *Morning News* was devoted to the Hultgreen crash and the questions that arose in its aftermath. Multiple articles and editorials concerning the Hultgreen crash and the "double standards" issue followed in the Chicago *Tribune*, the Air Force *Times*, the Navy *Times*, and the Los Angeles *Times*. On February 28, 1995 ABC-TV's *Nightline* program focused on the Hultgreen crash, and the broadcast was replete with references to double-standards in naval aviation and the questions raised by Hultgreen's death. In her deposition,

LOHRENZ admitted that even she did not believe the Navy's "engine failure" story as presented at a Navy news conference and on ABC *Nightline*.

LOHRENZ also admitted in her deposition that she was the focus of extensive press and media attention long before the Respondents published anything about her. LOHRENZ testified that when she chose to become an F-14 pilot she knew she would be the subject of publicity, and she acknowledged that her likeness was even utilized by the Navy for a recruiting poster. LOHRENZ testified that after the death of Lt. Kara Hultgreen, she felt like she was under the spotlight of the media as the only remaining woman F-14 carrier-qualified pilot.

Adm. Stanley Arthur, the Vice Chief of Naval Operations, testified that following the Hultgreen crash there was considerable public controversy and media attention over whether Hultgreen and LOHRENZ were qualified to fly the F-14. He said that he was concerned, and that civilians such as DONNELLY had the right to be concerned about the subject. Adm. Kendall Pease, the retired Chief of Naval Information (CHINFO), echoed Adm. Arthur's testimony.

Shortly after the Hultgreen mishap, Lt. Patrick J. Burns, USN, then a Radar Intercept Officer (RIO) and one of LOHRENZ's and Hultgreen's instructors, placed an unsolicited telephone call to the Respondents from San Diego. He advised Respondent DONNELLY of his concerns about compromises made during the F-14 training of Hultgreen and LOHRENZ in the FRS, the unwillingness of local commanders to acknowledge them, the persistent attempts by some Navy officials to mislead the public about Hultgreen's death and serious training errors that presaged it, and his

concern that acceptance of the *status quo* would elevate risks for both men and women in combat aviation.

Burns sent Respondent DONNELLY a detailed letter dated December 14, 1994 asserting that both Lt. Kara Hultgreen and LOHRENZ had been promoted because of political pressure to incorporate women in tactical aviation, with their competence to fly the F-14 in combat operations as a secondary consideration. Burns indicated that he was concerned about safety and high standards in naval aviation and that naval commanders had not responded to concerns about Hultgreen's and LOHRENZ's competence that he had expressed on several occasions -- twice in the presence of others. For Burns as well as DONNELLY, the compelling issue was safety and excellence in carrier aviation.

Longstanding performance deficiencies that LOHRENZ did not correct herself put her on the "watch list" of carrier squadron VF-213 on January 3, 1995, long before the Respondents published anything about her. On January 6, 1995 Respondent DONNELLY met with Adm. Stanley Arthur in Washington, D.C. to attempt to verify the events and practices described by Burns and to allow Arthur to respond to them. Donnelly related to him a chronicle of events, including a high number of major errors marked with "pink sheets" for unsatisfactory performance, indicating the Navy tried to bring women into combat roles even if it meant changing the definition of "qualified." By letter dated January 16, 1995 DONNELLY and CMR asked Sen. Strom Thurmond, then-Chairman of the Senate Armed Services Committee, to investigate whether the statements of DONNELLY's known but unnamed source (Lt. Burns), regarding the training of Hultgreen and LOHRENZ, were true or not.

On February 7, 1995 Lt. Burns sent to DONNELLY, via facsimile, two pages of the FRS training records of LOHRENZ and Hultgreen. DONNELLY again met with Adm. Arthur on February 8, 1995. Burns mailed copies of the FRS training records of LOHRENZ and Hultgreen to DONNELLY on March 3.

In response to the letter of DONNELLY and CMR to Sen. Thurmond, and in apparent response to DONNELLY's discussions with him at their first meeting, Adm. Arthur referred the matter to Rear Adm. Lyle Bien for investigation. After interviewing LOHRENZ's VF-124 instructors in San Diego, including Lt. Burns, Bien prepared a written report, dated January 31, 1995. At a third meeting held on March 24, 1995, Adm. Arthur allowed DONNELLY and Robert Carey, an aide to then-Sen. Spencer Abraham, to examine Bien's January 31 report for approximately twenty minutes. The "Bien Report" specifically referenced DONNELLY's letter to Sen. Thurmond and its attachment, and found the information contained therein to be, in Bien's words, "largely accurate." The "Bien Report" also contained findings by Adm. Bien of even more unusual (and sometimes unprecedented) concessions that were extended to LOHRENZ, a single struggling pilot, so that she would not fail.

In his deposition, Adm. Arthur testified, in part, as follows regarding what happened at the March 24 meeting with Respondent DONNELLY:

Q Yes. And you also knew that Admiral Bien's comments... highlighting the special considerations being given these two pilots would also be of concern to Ms. Donnelly?

A Yes.

Q And that would also corroborate what Ms. Donnelly had been concerned about in terms of double standards?

A ... yes, in the final analysis, **you and I both agree we can't send pilots to the fleet that are not qualified, and in this case we sent people to the fleet not qualified.**

Q You have no doubt about her sincerity and her beliefs?

A No, I know she feels these issues very strongly.

Q And you have no doubt that what Lyle Bien reported could be seen by her as corroborating the concerns she expressed to you?

A I'm sure they were, yes.

(Emphasis added).

After almost five months of investigation, DONNELLY and CMR finally published the fully documented 120-page *CMR Special Report: Double Standards in Naval Aviation* on April 25, 1995. The *Special Report* re-published the letter sent to Senator Strom Thurmond containing the concerns of Lt. Burns, and highlighted the training of both Lt. Kara Hultgreen and LOHRENZ by reproducing training summaries and "pink sheets" earned by both women in the FRS. The facts presented therein were true and accurate then, and remain so today. CMR joined the ongoing debate about double standards by setting forth credible evidence, including contrary statements, indicating that female aviators received special concessions, and that Petitioner was one pilot who received even more concessions that permitted her to advance. In the *Special Report*, Respondents referred to LOHRENZ only as "Pilot B," rather than by name.

In response to the *Special Report*, Adm. Bien prepared but did not publicly release a "Supplementary Report on Aviation Training Issues" dated May 4, 1995. Adm. Bien stated that "the sections discussing the training records of the female aviators are largely accurate, as I noted in my first report."

On May 31, 1995 Cmdr. F.J. Kilian, Commanding Officer of Fighter Squadron 213, convened a Field Naval Aviator Evaluation Board (FNAEB) to consider LOHRENZ's flight status.[2] The FNAEB and subsequent reports found that LOHRENZ's flying techniques were "unsafe, unpredictable, and undisciplined," and recommended that LOHRENZ be removed from carrier-based aviation and that she be assigned only to non-carrier aviation. Following the issuance of the FNAEB report and recommendations, the findings were endorsed by LOHRENZ's commanding officer, Cmdr. F.J. Kilian, and Carrier Air Group Commander, Capt. D.M. Gillespie, but they and Battle Group Commander, Adm. Jay B. Yakeley, and Pacific Naval Aviation Commander, Adm. R.J. Spane, concluded that LOHRENZ should be removed from naval aviation.

Following LOHRENZ's removal from flight status in June 1995, LOHRENZ's parents complained to Navy officials and the Navy responded with an extraordinary series of investigations. The first was conducted by Capt. James A. Carman and other officers. The "Carman Report" and other subsequent reports upheld the FNAEB, concluding that LOHRENZ was a consistently poor pilot, and had a pattern

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[2] LOHRENZ declined the opportunity to challenge FRS training records cited by the FNAEB, which were identical to those published by Respondents.

of ignoring instructions from her superiors and blaming others for her own mistakes.

LOHRENZ's parents then wrote to Navy Secretary Richard Danzig, complaining about their daughter's treatment. After yet another investigation, Rear Adm. J.I. Maslowski, Chief of Naval Personnel, informed LOHRENZ on January 22, 1996 that the FNAEB would not be disturbed. Subsequently, Adm. Brent M. Bennit, Commander of the Naval Air Force, U.S. Pacific Fleet, denied LOHRENZ's request for reinstatement of flight status, concluding that she was properly removed from flight status.

The Naval Inspector General re-investigated many of the issues examined in the "Carman Report." On February 10, 1997 the Naval Inspector General issued the "Report of Investigation, Integration of Women Into Carrier Air Wing Eleven" (AW-11 Report).[3] The AW-11 Report concluded, *inter alia*:

> LT Lohrenz was unable to compartmentalize, and this contributed to her performance deficiencies. [T]he FNAEB concluded that other reasons -- lack of motor skills, slow scan, and lack of motivation -- also were contributing factors. But whatever the reason -- stress, lack of motor skills, problems with scanning,

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[3] Petitioner's notoriety and importance to the Navy as one of its female "pioneer" combat aviators is underscored by the sheer number and the scope of investigations which the Navy conducted at her behest after her removal from flight status. The Navy hardly would have devoted such enormous government resources to just any fighter pilot. The multiple investigations conducted by the Navy also corroborated the accuracy of many facts published by Respondent in the *Special Report*.

> inability to comprehend what she was being told to do, unwillingness to comply with the signals of the LSOs [landing signal officers] due to lack of trust or a belief that she knew what was better for her -- the bottom line is that a pilot must respond to the signals of the LSO, and LT Lohrenz did not. A pilot who cannot, or will not, follow the directions of the LSO is inherently unsafe and must be removed from the carrier flying environment.

The AW-11 Report also contained extensive discussions of media coverage and notoriety of Lt. Hultgreen and LOHRENZ as the first female combat pilots in the Navy. The AW-11 Report stated, *inter alia*:

> 146. The media's interest in reporting on the first women in carrier aviation was significant. It was reasonable that the Navy would want the stories to be as positive as possible. Women in combat aviation was an historic and enormous social change, and in the aftermath of several years of negative stories the Navy hoped to get both quality and quantity coverage on this issue.
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> *** *** ***
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> 151. Beyond the individual pressure brought by the focused attention, as the women became "celebrities" additional pressures were introduced, which increased the "obligation" on them to succeed. The failure of any single female aviator would have implications (at least in the media) far greater than the concerned individual. Failure would be portrayed as failure of the female gender. From an institutional standpoint, the Navy should have recognized the serious impact an

> individual female's failure would have on the integration process itself, especially if that woman had previously been the focus of media attention.

Following the Respondents' publication of the *Special Report*, the FNAEB, and LOHRENZ's removal from flight status, the conduct of LOHRENZ and her then-lead counsel, Susan Barnes, illustrates that LOHRENZ had ready access to powerful, major media allies to reply to the statements contained in the *Special Report*, and she utilized these major channels of effective communication to do so. In an affidavit dated May 31, 1997, filed in United States District Court for the District of Columbia, Civil Action No. 96CV2468(EGS), in the case styled *Lohrenz, et al. v. The Department of the Navy*, LOHRENZ's lead counsel testified, *inter alia*, regarding LOHRENZ's access to the media following the release of the *Special Report*, the FNAEB, and LOHRENZ's removal from flight status. LOHRENZ testified that she "approved" the affidavit prior to its filing and stated that her counsel had full authority to do whatever was appropriate to advance her case and her career. The affidavit stated, *inter alia*, as follows:

> 6. The second important source of information has been members of the news media who have communicated with me and my clients during the course of their news gathering for stories on Lt. Lohrenz, Lt. Carel and the other female pilots of Air Wing 11. As the Navy's almost total control over access to the evidence relevant to Plaintiff's claims and Defendant's dispositive motion became increasingly apparent, so did the necessity to cooperate with the reporters who were working on various aspects of the Air Wing 11 story. Lt. Lohrenz in particular has an obligation to mitigate the damages

done by the violation of her Privacy Act rights and the defamation committed by those who released selected and doctored portions of her training records to the public and untruthfully attacked her qualifications as a naval aviator.[4] That means that she must take advantage of every reasonable opportunity to publicize the truth.

7. We concluded that the best way to mitigate her damages would be to cooperate with any responsible reporter's effort to ascertain the truth by providing information in a neutral way which would enable reporters to judge what the truth is for themselves. We made no special arrangements with any of them. Most of the reporters zealously protected the identity of confidential sources just as we did, and they were careful to maintain their independence as objective professionals. Nonetheless as they exchanged information with us as part of the ordinary fact-checking and developing leads that goes on between any good reporter and the subject of a complex story, it became apparent to us that many of them had better access to reliable sources and information inside the Navy than we did.

8. Over the many months that we worked with our own Navy sources and with approximately a half dozen news organizations on various aspects of the story, we were able to piece together a chronology of

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[4] In her deposition, LOHRENZ identified the FRS training records in question, and admitted that none had been "doctored" by Respondents.

what happened and make a positive identification of the participants.

LOHRENZ testified that in December 1995, approximately eight months after the publication of the *Special Report*, and some four months before she instituted her defamation action, she was contacted by NBC's *Dateline* program. Both LOHRENZ and her counsel provided information to *Dateline*, all of it, of course, maligning DONNELLY and CMR and promoting LOHRENZ's version of events. The *Dateline* segment was aired on July 3, 1996. Additionally, in February 1998, LOHRENZ appeared on CBS's *60 Minutes*.

On April 22, 1996 Petitioner LOHRENZ instituted this action for libel and false light invasion of privacy against Respondent ELAINE DONNELLY ("DONNELLY") and Respondent CENTER FOR MILITARY READINESS ("CMR"), as well as News World Communications, Inc. d/b/a the Washington *Times* ("News World"), and the Copley Press, Inc. d/b/a the San Diego *Union-Tribune* ("Copley"). The District Court first held that LOHRENZ was a "limited-purpose public figure" under the test set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), and its progeny. Pet.App.B, at 57b-61b. It did not state, explicitly or implicitly, that LOHRENZ was an "involuntary limited-purpose public figure," but instead simply left the question open, holding that "plaintiff Lohrenz was a limited-purpose public figure, **albeit possibly involuntarily**." Pet.App.B, at 61b. The District Court found that LOHRENZ engaged in sufficiently volitional and purposeful activity, especially in giving multiple statements to the press regarding her status and abilities as one of the first female F-14 pilots, to render her a "limited-purpose public figure" under *Waldbaum* and its progeny. Pet.App.B, at 58b. It held that as a "limited-

purpose public figure," LOHRENZ was required to bring forth clear and convincing evidence of actual malice in order to avoid summary judgment, and that LOHRENZ had failed to do so with respect to each of the publications which were the subject of her Second Amended Complaint. Pet.App.B, at 69b-91b.

The United States Court of Appeals for the District of Columbia Circuit affirmed. The Court of Appeals concluded that LOHRENZ was a voluntary limited-purpose public figure because she chose combat training in the F-14 while she was well aware of the public controversy over women in combat roles, "and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory." Pet.App.A, at 2a-3a. The Court of Appeals held: "Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she 'suited up' as an F-14 combat pilot." Pet.App.A, at 3a. The Court of Appeals went on to conclude:

> Lt. Lohrenz was not just any fighter pilot; when she "suited up," she could reasonably have been expected to know that she was assuming a position of "'special prominence'" in the controversy about women in combat roles. Again, it was not Lt. Lohrenz's decision to pursue a Navy career as a combat jet pilot that made her a public figure, but rather that in so doing she assumed the risk of success whereby she would become one of the first few women combat pilots and thus necessarily attain "'special prominence'" in an ongoing public controversy about such opportunities. Finally, the result here is consistent with *Gertz*'s principle that only those with

> access to the media to defend themselves should be designated public figures. *See* 418 U.S. at 345. Lt. Lohrenz possessed ready access to the channels of public discourse, as evidenced not only by the media attention she received when first assigned as a combat pilot along with Lt. Hultgreen, but by her appearance on April 19, 1998, on the CBS television program *60 Minutes*.

Pet.App.A, at 19a.

The Court of Appeals concluded that the "actual malice" standard applied to the publications at issue, and held that LOHRENZ failed to meet her burden of proving "actual malice" on the part of Respondents by clear and convincing evidence. Pet.App.A, at 20a-28a.

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First, the decision of the Court of Appeals finding LOHRENZ to be a voluntary limited-purpose public figure is in keeping with this Court's analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The Court of Appeals' application of its holding in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), to the uncontested material facts in this case is consistent with *Gertz*.

Second, because the Court of Appeals found LOHRENZ to be a voluntary limited-purpose public figure, the Petitioner's attempt to skew the Court of Appeals' holding and mischaracterize its analysis as an "involuntary limited-purpose public figure" construct is a red herring. The Petitioner has not demonstrated a conflict among the federal

circuits regarding the scope and application of the voluntary limited-purpose public figure doctrine, and the Court of Appeals did not hold LOHRENZ to be an involuntary limited-purpose public figure.

Third, if accepted, Petitioner's position would do violence to well-established First Amendment principles and would have a chilling effect on protected speech, including speech regarding the policies, conduct, and credibility of powerful and influential government institutions such as the United States Navy.

ARGUMENT

I. THE CONCLUSION OF THE COURT OF APPEALS THAT LOHRENZ WAS A VOLUNTARY LIMITED-PURPOSE PUBLIC FIGURE IS CONSISTENT WITH THIS COURT'S ANALYSIS IN *GERTZ V. ROBERT WELCH, INC.*, 418 U.S. 323 (1974).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), this Court set forth the general framework for determining when a person is a public figure or a private individual for purposes of application of the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Justice Powell observed that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz*, 418 U.S. at 343, 94 S.Ct. at 3008.

At the core of Justice Powell's analysis were the opportunities for rebuttal enjoyed by public figures and the risk of publicity which public figures assumed by virtue of their status. Justice Powell properly observed that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy." *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. Justice Powell then observed that just as a public official "runs the risk of closer scrutiny than might otherwise be the case," "[t]hose classed as public figures stand in a similar position." *Gertz*, 418 U.S. at 344-345, 94 S.Ct. at 3009. Justice Powell defined limited-purpose public figures as those persons "who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and that in doing so, limited-purpose public figures "invite attention and comment." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. Justice Powell recognized that those who have attained public figure status "have assumed roles of especial prominence in the affairs of society." *Id.* Following this Court's decision in *Gertz*, the United States Court of Appeals for the District of Columbia Circuit expounded the criteria for determining whether a defamation plaintiff is a limited-purpose public figure, or public figure for particular public controversies, in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

The Court of Appeals held that a court's first step is to "isolate the public controversy." *Waldbaum*, 627 F.2d, at 1296. It defined a public controversy as "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Id.*

The Court of Appeals next held that after defining the controversy, the court "must analyze the plaintiff's role in it." *Id.* The plaintiff "must have achieved a 'special prominence' in the debate." *Id.* The Court of Appeals stated:

> The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. [footnote omitted] In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. [citation omitted]

Id.

Finally, the Court of Appeals stated that a court's final task was to review the allegedly defamatory publication in conjunction with the public controversy, holding that "the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Waldbaum*, 627 F.2d, at 1298.

Applying the foregoing factors, the Court of Appeals concluded that the plaintiff, Eric Waldbaum, was indeed a limited-purpose public figure. It found that Greenbelt's marketing policies, which the Court characterized as "pathbreaking" and "pioneering," were the subject of public debate and controversy within the supermarket industry and beyond, and that "public controversies existed over the viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that Greenbelt in particular was pioneering." *Waldbaum*, 627 F.2d, at 1299.

The Court of Appeals next found that Waldbaum was a leading public advocate of the controversial policies and practices of the cooperative and therefore "had thrust himself into the public controversies concerning unit pricing, open dating, the cooperative form of business, and other issues." *Waldbaum*, 627 F.2d, at 1300. Importantly, the Court of Appeals recognized that assumption of risk through purposeful action was the key component in determining the status of a person under Justice Powell's *Gertz* analysis. The Court of Appeals observed that Waldbaum had prior dealings with the press and concluded that in so doing Waldbaum "assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management," which was the subject of the allegedly defamatory statements at issue. *Id.*

The decision of the United States Court of Appeals for the District of Columbia Circuit was the result of the proper application of the *Waldbaum* decision, which had long been recognized in that circuit as the guide for determining whether and to what extent a defamation plaintiff is a public figure. *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C.Cir. 1987) (*en banc*). The Court of Appeals' application of the *Waldbaum* test to the uncontested material facts in the present case was also loyal to Justice Powell's concept of the limited-purpose public figure articulated in *Gertz*.

In her Petition, LOHRENZ concedes that a public controversy existed over the assignment of women in combat at all times relevant to the publications in issue. The Court of Appeals properly concluded that LOHRENZ achieved a "special prominence" in the controversy due to her "purposeful action" in choosing to become, and actually achieving the accomplishment of becoming, one of the first two women in combat aviation. "[B]y reason of the notoriety

of [her] achievements," *Gertz*, 418 U.S. at 342, 94 S.Ct. at 3008, in the midst of a national public controversy surrounding the issue, LOHRENZ "invited attention and comment." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. Lohrenz objectively and subjectively assumed the risk of closer public scrutiny due to her being a "pioneer" in naval combat aviation at a time of such public controversy, embarking on a path of conscious, purposeful action and endeavor that could hardly be classified as "sheer bad luck." Indeed, LOHRENZ engaged in a series of conscious decisions which led to her notoriety as one of the first female F-14 pilots. Through her own "purposeful activity," including comments to the press and media about the standards applied to her in her training, she also objectively assumed the risk of publicity. Moreover, LOHRENZ subjectively assumed the risk of publicity because she acknowledged that she was told and fully understood that she would be in the media spotlight when she voluntarily signed her "dream sheet" in order to become one of the first women to fly the F-14 after the controversial 1993 repeal of longstanding policy by Secretary of Defense Les Aspin. LOHRENZ voluntarily injected herself into the controversy surrounding women in combat aviation, and that controversy only magnified after the death of Lt. Kara Hultgreen and the attempt by high Navy officials to obscure the harsh realities surrounding the crash and the training that preceded it. Of course, there is no doubt that the publications at issue made by Respondents were germane to the controversy both before and after the death of Lt. Kara Hultgreen.

The Court of Appeals' recognition of LOHRENZ as a voluntary limited-purpose public figure is also buttressed by her access to "the channels of effective communication," *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009, following the Respondents' publications at issue. LOHRENZ was contacted

by *Dateline NBC* in 1995 and appeared in a segment on that national broadcast devoted and slanted to her side of the story in July 1996. In 1998 LOHRENZ also appeared on CBS' *60 Minutes* broadcast. The Court of Appeals correctly applied the factors enunciated by Justice Powell in *Gertz* to conclude that LOHRENZ was a voluntary limited-purpose public figure.

II. THE PETITIONER'S ATTEMPT TO CHARACTERIZE THE COURT OF APPEALS' OPINION AS EMBRACING AN "INVOLUNTARY LIMITED-PURPOSE PUBLIC FIGURE" ANALYSIS IS A FALSE CONSTRUCT DESIGNED TO MANUFACTURE A CIRCUIT CONFLICT WHERE NONE EXISTS.

The Petitioner devotes the bulk of her Petition to a discussion of the "involuntary limited-purpose public figure" concept and attempts to characterize the Opinion of the Court of Appeals as embracing such analysis. Such a blatant mischaracterization of the Opinion of the Court of Appeals is merely a false construct created to try to fit a square peg into a round hole and thereby manufacture a conflict amongst the federal circuits where none exists.

Obviously, the Court of Appeals found LOHRENZ to be a **voluntary** limited-purpose public figure. Rather than addressing this holding forthrightly, LOHRENZ re-writes the Opinion below in order to convince this Court that a federal circuit conflict somehow exists as a result of, or has been created by, the Opinion of the United States Court of Appeals for the District of Columbia Circuit. This is nothing but a red herring based upon a preexisting academic treatise having nothing to do with the uncontested material facts of the case. See, Smolla and Nimmer, 2 *Smolla and Nimmer on Freedom*

of Speech, §23:4, at 23-40.7 - 23-40.9. In fact, large portions of LOHRENZ's Petition read virtually verbatim from this treatise. Essentially, Petitioner is attempting to paint herself as an involuntary limited-purpose public figure in order to create an issue where none exists. LOHRENZ simply cannot re-write the Opinion below and engage in revisionist history to fit a preconceived legal argument that simply does not apply here.

With respect to voluntary limited-purpose public figures, there exists no conflict amongst the federal circuits, let alone a "sharply defined conflict... between the Court of Appeals for the District of Columbia and the Court of Appeals for the Fourth Circuit." *Petition*, at 24. The United States Court of Appeals for the Fourth Circuit has, in fact, embraced an analysis consistent with that of the District of Columbia Circuit in *Waldbaum* and in the Opinion below. See, *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001), *cert. denied*, 535 U.S. 988, 122 S.Ct. 1542, 152 L.Ed.2d 468 (2002) (discussing five-factor test to determine whether plaintiff has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status).

The Petitioner's assertion that the Fourth Circuit's decision in *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118, 120 S.Ct. 939, 145 L.Ed.2d 817 (2000), somehow establisnes a circuit conflict with the United States Court of Appeals for the District of Columbia Circuit by virtue of the Opinion below is utterly lacking in merit. In *Wells*, the Fourth Circuit held that the plaintiff's actions could not establish her voluntary public-figure status because her "discussions with the FBI, response to the grand jury subpoena, and appearance before the Senate committee simply were not voluntary actions but rather were compelled by force of law." *Wells*, 186 F.3d, at 536. In stark contrast,

LOHRENZ's conscious series of decisions and actions in the midst of an ongoing public and highly political controversy, "purposeful action of [her] own," in Justice Powell's words, were volitional and in no way compelled by force of law or otherwise.

The Court below quite correctly concluded that "Lt. Lohrenz was not just any fighter pilot." Pet.App.A, at 19a. LOHRENZ's access to channels of effective communication existed long before the Respondents' publications and continued following such publications, as epitomized by the *Dateline NBC* and *60 Minutes* segments devoted to LOHRENZ. Under *Gertz*, Respondents were entitled to act on the assumption that LOHRENZ was not exempt from publicity given the uncontested material facts and the contours of the public controversy preceding the publications at issue. The Opinion below is not in conflict with the decisions of other federal circuits, and is true to Justice Powell's analysis in *Gertz*.

III. CLASSIFYING LOHRENZ AS A "PRIVATE FIGURE" WOULD DO VIOLENCE TO ESTABLISHED FIRST AMENDMENT VALUES.

There can be no doubt that a substantial ongoing public controversy existed regarding the assignment and training of women in combat positions long before the Respondents published anything regarding LOHRENZ. Such public controversy dealt directly with the policies, conduct, and standards of a powerful government institution, the United States Navy. In the wake of the Hultgreen crash, multiple newspapers and media reported on the double standards issue and the Navy's denials of allegations of double standards, including ABC, CBS, and the New York *Times*, among others. The central First Amendment value of free and open

debate over matters of governmental policies and practices is at its pinnacle in such circumstances. The position advocated by Petitioner would undermine, if not totally obliterate, this central First Amendment value to fit the subjective sensibilities of Petitioner after the fact.

LOHRENZ was a key player in a public controversy regarding a powerful government institution charged with protecting the interests of the United States and the lives of its citizens. Citizens generally and the press and media must be accorded free rein in discussing the management and policies of government institutions and those persons involved in controversies concerning the management and policies of such institutions. In the months preceding the publications at issue, multiple media and press reported and opined on the double standards issue. The Respondents, after extensive investigation, published detailed information on the double standards issue. The approach advocated by Petitioner would cordon off from scrutiny and comment the details of public controversy, including names, dates, and actions relevant to the public controversy. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 2695, 105 L.Ed.2d 562 (1989), citing *Gertz*, 418 U.S., at 342, 94 S.Ct., at 3008. Acceptance of Petitioner's position would have a profound chilling effect on freedom of speech and the press, as the press and media would abstain from publishing detailed information that might be viewed, after the fact, as crossing the amorphous line of demarcation subjectively established by Petitioner's legal construct and the negligence standard proceeding from such construct. The balance struck under such a regime actually would be one of self-censorship for

fear of hindsight retribution, and an imbalance dangerous to the rights and liberties of all citizens generally and anathema to concepts of self-government. Acceptance of Petitioner's characterization of herself as anything but a public figure would stifle public awareness, debate, and criticism of government institutions and would be at odds with well-established First Amendment principles. This Court should not accept Petitioner's invitation to embark on such a dangerous course.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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